No. 16-285	
Title:	**Epic Systems Corporation, Petitioner** **v.** **Jacob Lewis**
Docketed:	September 2, 2016
Linked with 16A93	
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(15-2997)
Decision Date:	May 26, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jul 25 2016	Application (16A93) to extend the time to file a petition for a writ of certiorari from August 24, 2016 to September 23, 2016, submitted to Justice Kagan.
Jul 29 2016	Application (16A93) granted by Justice Kagan extending the time to file until September 23, 2016.
Sep 02 2016	Petition for a writ of certiorari filed. (Response due October 3, 2016)
Sep 07 2016	Consent to filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioner.
Sep 20 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent.
Sep 29 2016	Order extending time to file response to petition to and including November 14, 2016.
Sep 30 2016	Brief amicus curiae of Pacific Legal Foundation filed.
Sep 30 2016	Brief amicus curiae of International Association of Defense Counsel filed.
Oct 03 2016	Brief amicus curiae of Equal Employment Advisory Council filed.
Oct 03 2016	Brief amici curiae of National Association of Manufacturers, et al. filed. VIDED.

Oct 03 2016	Brief amicus curiae of Chamber of Commerce of the United States filed.
Oct 03 2016	Brief amicus curiae of New England Legal Foundation filed.
Oct 03 2016	Brief amicus curiae of Atlantic Legal Foundation filed.
Nov 14 2016	Brief of respondent Jacob Lewis in opposition filed.
Nov 29 2016	Reply of petitioner Epic Systems Corporation filed.
Nov 30 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 09 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Petition GRANTED The petition for a writ of certiorari in Nos. 16-300 and 16-307 are granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jan 25 2017	The following briefing schedule is adopted: Petitioners in Nos. 16-285 and 16-300 and respondents in No. 16-307 will file opening and reply briefs under the schedule set forth in Rules 25.1 and 25.3. Respondents in Nos. 16-285 and 16-300 and petitioner in No. 16-307 will file response briefs under the schedule set forth in Rule 25.2. VIDED.
Feb 20 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Respondent.
Feb 21 2017	The time to file the joint appendix and the opening briefs is extended to and including April 28, 2017. VIDED.
Feb 21 2017	The time to file the response briefs is extended to and including July 27, 2017. VIDED.
Apr 11 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Apr 28 2017	The time to file the joint appendix and the opening briefs is further extended to and including June 9, 2017. VIDED.
Apr 28 2017	The time to file the response briefs is further extended to and including August 9, 2017. VIDED.

Jun 07 2017	Motion to dispense with printing the joint appendix filed by petitioner Epic Systems Corporation.
Jun 09 2017	Brief of petitioner Petitioner Epic Systems Corporation and Respondent Murphy Oil USA, Inc. filed. VIDED.
Jun 16 2017	Brief amicus curiae of Equal Employment Advisory Council filed.
Jun 16 2017	Brief amici curiae of National Association of Manufacturers, et al. filed. VIDED.
Jun 16 2017	Brief amicus curiae of The Retail Litigation Center, Inc. filed. VIDED.
Jun 16 2017	Brief amicus curiae of the United States supporting Petitioners in Nos.16-285 and 16- 300 and supporting Respondents in No.307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED.
Jun 16 2017	Brief amicus curiae of The Business Roundtable supporting Epic Systems Corp., Ernst & Young LLP, and Murphy Oil USA, Inc. filed. VIDED.
Jun 16 2017	Brief amicus curiae of The Employers Group in support of Petitioners in Nos. 16-285 and 16-300 and in support of the Respondent Murphy Oil USA in No. 16-307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of Washington Legal Foundation in support of Petitioners in Nos. 16-285 and 16-300 and Respondent Murphy Oil in No.16-307 filed. VIDED.
Jun 16 2017	Brief amicus curiae of Pacific Legal Foundation filed.
Jun 16 2017	Brief amicus curiae of HR Policy Association filed. VIDED.
Jun 16 2017	Brief amicus curiae of Atlantic Legal Foundation filed. VIDED.
Jun 16 2017	Brief amicus curiae of Law Professors filed. VIDED.
Jun 16 2017	Brief amici curiae of Mortgage Bankers Association and State Mortgage Lending Association filed. VIDED.
Jun 16 2017	Brief amicus curiae of International Association of Defense Counsel filed. VIDED.

Jun 16 2017	Brief amici curiae of American Staffing Association, et al. filed. VIDED.
Jun 16 2017	Brief amicus curiae of Bristol Farms filed. VIDED.
Jun 16 2017	Brief amicus curiae of New England Legal Foundation filed. VIDED.
Jun 16 2017	Brief amicus curiae of DRI-The Voice of the Defense Bar filed. VIDED.
Jun 16 2017	Brief amici curiae of Council on Labor Law Equality, et al. filed. VIDED.
Jul 19 2017	SET FOR ARGUMENT on Monday, October 2, 2017. VIDED.
Aug 01 2017	Record requested from the U.S.C.A. 7th Circuit.
Aug 02 2017	Record received from the U.S.C.A. 7th Circuit is located on PACER with the exception of SEALED documents which are electronic.
Aug 09 2017	Brief of respondent Jacob Lewis filed.
Aug 09 2017	Record received from the U.S.D.C. Northern Dist. of Illinois is electronic.
Aug 10 2017	Brief amicus curiae of National Academy of Arbitrators filed. VIDED.
Aug 14 2017	CIRCULATED.
Aug 15 2017	Brief amici curiae of Ten International Labor Unions, et al. filed. VIDED. (Distributed)
Aug 16 2017	Statement of amici in support of motion of NLRB for divided argument filed. VIDED.
Aug 16 2017	Brief amicus curiae of Constitutional Accountability Center filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of Labor Law Professors filed. VIDED. (Distributed)
Aug 16 2017	Motion for divided argument filed by NLRB. VIDED.
Aug 16 2017	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.

Aug 16 2017	Brief amici curiae of Maryland, et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amici curiae of Main Street Alliance, et al. filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of American Association for Justice filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of Public Citizen, Inc. filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of Susan Fowler filed. VIDED. (Distributed)
Aug 16 2017	Brief amicus curiae of New York Taxi Workers Alliance filed. VIDED. (Distributed)
Aug 25 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Sep 08 2017	Reply of petitioner Epic Systems Corporation and respondent Murphy Oil USA, Inc. filed. VIDED. (Distributed)
Sep 25 2017	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 25 2017	Motion for divided argument filed by NLRB GRANTED.
Oct 02 2017	Argued. For petitioners in Nos. 16-285 & 16-300: Paul D. Clement, Washington, D. C.; and Jeffrey B. Wall, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For petitioner, acting as respondent, in No. 16-307: Richard F. Griffin, Jr., Washington, D. C. For respondents in Nos. 16-285 & 16-300: Daniel R. Ortiz, Charlottesville, Va. VIDED.
Oct 03 2017	Letter of NLRB regarding oral argument filed. VIDED. (Distributed)

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Neal Kumar Katyal Counsel of Record	Hogan Lovells US LLP 555 Thirteenth St., N.W. Washington, DC 20004	

	neal.katyal@hoganlovells.com	
Party name: Epic Systems Corporation and respondent Murphy Oil USA, Inc., et al.		
Paul D. Clement	Kirkland & Ellis LLP 655 Fifteenth Street, N.W Washington, DC 20005-5793 paul.clement@kirkland.com	202-879-5000
Party name: Epic Systems Corp.		
Attorneys for Respondent		
Daniel Roy Ortiz Counsel of Record	580 Massie Road Charlottesville, VA 22903 dortiz@law.virginia.edu	434-924-3127
Party name: Jacob Lewis		
David C. Zoeller Counsel of Record	Hawks Quindel ,S.C. 222 W. Washington Ave., Suite 450 Madison, WI 53701-2155 dzoeller@hq-law.com	(608) 257-0040
Party name: Jacob Lewis		
Harold C. Becker	815 16th St., NW Washington, DC 20006 cbecker@aflcio.org	(202) 637-5000
Party name: Sheila M. Hobson		
Max Folkenflik	Folkenflik & McGerity, LLP 1500 Broadway, Suite 812 New York, NY 10036 mfolkenflik@fmlaw.net	(212) 757-0400
Party name: Stephen Morris and Kelly McDaniel		
Jeffrey A. Schwartz	Jackson Lewis P.C. 1155 Peachtree St. NE, Suite 1000 Atlanta, GA 30309-3600 jschwartz@jacksonlewis.com	(404) 525-8200
Party name: Murphy Oil USA, Inc., et al.		
Kannon K. Shanmugam	Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005 kshanmugam@wc.com	(202) 434-5000
Party name: Ernst & Young LLP and Ernst & Young U.S. LLP		
Other		

David M. Axelrad Counsel of Record	Horvitz and Levy LLP 3601 West Olive Avenue 8th Floor Burbank, CA 91505-4681 daxelrad@horvitzlevy.com	818-995-0800

Party name: DRI-The Voice of the Defense Bar

Noel J. Francisco Counsel of Record	Solicitor Gene[illegible] United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: the United States

David C. Frederick Counsel of Record	Kellogg, Hansen, Todd, Figel & Frederick, PLLC 1615 M Street, NW, Suite 400 Washington, DC 20036 dfrederick@kellogghansen.com	(202)-326-7951

Party name: Labor Law Professors

Christopher Charles Murray Counsel of Record	Ogletree, Deakins, Nash, Smoak & Stewart, P.C. 111 Monument Circle, Suite 4600 Indianapolis, IN 46204 christopher.murray@odnoss.com	317-916-2522

Party name: Council on Labor Law Equality, et al.

Michael Rubin Counsel of Record	Altshuler Berzon LLP 177 Post Street, Suite 300 San Francisco, CA 94108 mrubin@altshulerberzon.com	415-421-7151

Party name: Ten International Labor Unions, et al.

Raymond Audain	NAACP Legal Defense & Educational Fund, Inc. 40 Rector St., 5th Floor New York, NY 10006 raudain@naacpldf.org	212-965 -2200

Party name: NAACP Legal Defense & Educational Fund, Inc., et al.

David M. Axelrad	Horvitz & Levy LLP 3601 W. Olive Ave., 8th floor Burbank, CA 91505-468 daxelrad@horvitzlevy.com	(818) 995-0800

Party name: DRI-The Voice of the Defense Bar

Samuel Robert Bagenstos	625 S. State St. Ann Arbor, MI 48109 sbagen@gmail.com	734-647-7584

Party name: Main Street Alliance

Christopher D. Baker	Baker Curtis & Schwartz, P.C. 44 Montgomery St., Suite 3520 San Francisco, CA 94104 cbaker@bakerlp.com	415-433-1064

Party name: Susan Fowler

Edward Fouad Berbarie	Littler Mendelson, P.C. 2001 Ross Avenue, Suite 1500, Lock Box 116 Dallas, TX 75201-2931 eberbarie@littler.com	(214)-880-8100

Party name: National Association of Manufacturers, et al.

Matthew William Finkin	National Academy of Arbitrators University of Illinois College of Law 504 East Pennsylvania Avenue Champaign, IL 61820 mfinkin@illinois.edu	(217)-333-3884

Party name: National Academy of Arbitrators

Stephen Andrew Fogdall	Schnader Harrison Segal & Lewis LLP 1600 Market Street Suite 3600 Philadelphia, PA 19103 sfogdall@schnader.com	(215)-751-2581

Party name: Mortgage Bankers Association and State Mortgage Lending Association

Brianne Jenna Gorod	Constitutional Accountability Center 1200 18th Street, NW Suite 501 Washington, DC 20036 brianne@theusconstitution.org	202-296-6889

Party name: Constitutional Accountability Center

Deepak Gupta	Gupta Wessler PLLC 1900 L Street, NW Washington, DC 20036 deepak@guptawessler.com	202-888-1741

Party name: American Association for Justice

Beth Heifetz	Jones Day 51 Louisiana Ave. NW Washington, DC 20001	(202) 879-3939

bheifetz@jonesday.com

Party name: The Employers Group in support of Petitioners in Nos. 16-285 and 16-300 and in support of the Respondent Murphy Oil USA in No. 16-307

Patrick Browning Hughes	Assistant Attorney General 200 St. Paul Place Baltimore, MD 21202 phughes@oag.state.md.us	410-576-6325

Party name: Maryland, et al.

William M. Jay	Goodwin Procter LLP 901 New York Avenue, N.W. Washington, DC 20001 wjay@goodwinlaw.com	(202) 346-4000

Party name: The Business Roundtable supporting Epic Systems Corp. Ernst & Young LLP, and Murphy Oil USA, Inc.

Steven B. Katz	Costangy Brook Smith & Prophete LLP 2029 Century Park East Suite 1100 Los Angeles, CA 90067 skatz@constangy.com	(310) 909-7775

Party name: Bristol Farms

Martin S. Kaufman	Atlantic Legal Foundation 500 Mamaroneck Avenue, Suite 320 Harrison, NY 10528 mskaufman@atlanticlegal.org	(914) 834-3322

Party name: Atlantic Legal Foundation

Deborah J. La Fetra	Pacific Legal Foundation 930 G Street Sacramento, CA 95814 dlafetra@pacificlegal.org	(916) 419-7111

Party name: Pacific Legal Foundation

John B. Lewis	Baker & Hostetler LLP Key Tower, Suite 2000 127 Public Square Cleveland, OH 44114 jlewis@bakerlaw.com	(216) 621-0200

Party name: American Staffing Association, et al.

Thomas R. McCarthy	Consovoy McCarthy Park PLLC Antonin Scalia Law School Supreme Court 3033 Wilson Boulevard, Suite 700 Arlington, VA 22201 tom@consovoymccarthy.com	703-243-9423

Party name: Law Professors

Jeanne Mirer	Mirer, Mazzocchi, Julien & Chickedantz 150 Broadway, Suite 1200 New York, NY 10038 jmirer@mmsjlaw.com	212-231-2235

Party name: New York Taxi Workers Alliance

Scott Lawrence Nelson	Public Citizen Litigation Group 1600 20th Street, N.W. Washington, DC 20009 snelson@citizen.org	202-588-1000

Party name: Public Citizen, Inc.

Andrew J. Pincus	Mayer Brown LLP 1999 K Street, NW Washington, DC 20006 apincus@mayerbrown.com	(202) 263-3000

Party name: Chamber of Commerce of the United States of America

Benjamin G. Robbins	New England Legal Foundation 150 Lincoln Street Boston, MA 02111-2504 benrobbins@nelfonline.org	(617) 695-3660

Party name: New England Legal Foundation

Richard A. Samp	Washington Legal Foundation 2009 Massachusetts Avenue, N.W. Washington, DC 20036 rsamp@wlf.org	(202) 588-0302

Party name: Washington Legal Foundation in support of Petitioners in Nos. 16-285 and 16-300 and Respondent Murphy Oil in No.16-307

Samuel Scott Shaulson	Morgan Lewis Bockius LLP 101 Park Avenue New York, NY 10178 sshaulson@morganlewis.com	212.309.6718

Party name: HR Policy Association

Mary-Christine Sungaila	Haynes and Boone, LLP 600 Anton Blvd., Suite 700 Costa Mesa, CA 92626 mc.sungaila@haynesboone.com	(949) 202-3062

Party name: International Association of Defense Counsel

Adam G. Unikowsky	Jenner & Block, LLP 1099 New York Avenue, NW, Suite 900 Washington, DC 20001-4412	(202) 639-6000

aunikowsky@jenner.com

Party name: Retail Litigation Center, Inc.

Rae T. Vann

NT Lakis, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005

(202) 629-5600

rvann@ntlakis.com

Party name: Equal Employment Advisory Council

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 2 - 2016
OFFICE OF THE CLERK

16-285

No. 16-____

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
131 South Dearborn Street
Chicago, IL 60603

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

Library of Congress

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

1. Epic Systems Corporation, petitioner on review, was the defendant-appellant below.

2. Jacob Lewis, respondent on review, was the plaintiff-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

Epic Systems Corporation has no parent corporation, and no publicly held company owns 10% or more of Epic Systems Corporation's stock.

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RULE:

Fed. R. Civ. P. 23 17

IN THE

Supreme Court of the United States

No. 16-____

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Epic Systems Corporation (Epic) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 823 F.3d 1147. The District Court's opinion denying Epic's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300.

JURISDICTION

The judgment of the Seventh Circuit was entered on May 26, 2016. On July 29, 2016, Justice Kagan extended the time within which to file a petition for a

writ of certiorari to and including September 23, 2016. *See* No. 16A93. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA).

The FAA provision at issue states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C. § 2.]

Two provisions of the NLRA are at issue. The first, Section 7 of the NLRA, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a

> labor organization as a condition of employment as authorized in section 158(a)(3) of this title. [29 U.S.C. § 157.]

The second, Section 8 of the NLRA, states:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title * * *. [*Id.* § 158(a).]

INTRODUCTION

This case is about the enforceability of arbitration agreements under the FAA. As a matter of federal substantive law, the FAA establishes a presumption in favor of enforcing arbitration agreements as written. *See* 9 U.S.C. § 2. This presumption may be overcome by another federal statute, but only—as the Court has recently reaffirmed—if that statute qualifies as a "congressional command" that is "contrary" to the FAA's enforcement mandate. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). The question presented here arises in the context of employer-employee agreements that require employment-related disputes to be resolved through individual arbitration and not class or collective arbitration. It asks whether Section 7 of the NLRA, which gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, qualifies as a contrary congressional command sufficient to overcome the FAA's presumption that these agreements should be enforced according to their terms.

The courts are squarely divided over this important and recurring question. Three federal courts of appeals (the Second, Fifth, and Eighth Circuits) and two state courts of last resort (the California and Nevada Supreme Courts) have concluded that the answer is no: agreements to submit employment disputes to individual arbitration are fully enforceable. Two other federal courts of appeals (the Seventh and Ninth Circuits)—as well as the National Labor Relations Board—have concluded that the answer is yes: these agreements are unenforceable because they bar class and collective proceedings. Thus the outcome of a case deciding the question presented will depend on whether the case is filed in one circuit or another—and, in the Ninth Circuit, on whether the case is litigated in state or federal court. This divergence in authority renders the dispute-resolution process in employer-employee relationships unpredictable, to the detriment of employers and employees alike.

The question presented has been fully ventilated and the subject of both majority and dissenting opinions by eminent jurists. This Court's intervention is needed now to resolve the acknowledged and intractable split. The petition should be granted.

STATEMENT

1. Epic Systems Corporation is a Wisconsin-based company that makes software for recording, organizing, and sharing healthcare data. Across the country, Epic's software is used every day by hospitals, academic medical facilities, retail clinics, safety-net providers, and other healthcare organizations. Epic relies on its own employees to develop, install, and maintain its software.

In April 2014, Epic sent an email to many of its employees. Pet. App. 2a. Contained within the email was an arbitration agreement. *Id.* The email asked recipients to review and acknowledge the agreement by responding in one of two ways: the recipients could either confirm that they understood and consented to the agreement, or they could request that someone contact them about it. *Id.*; C.A. App. 15.

One day after receiving the email, Jacob Lewis, who was then a technical communications employee of Epic, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. Pet. App. 2a. In doing so, Lewis "agree[d] to use binding arbitration, instead of going to court, for any 'covered claims'"—a category that the agreement specifically defined as including any "claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law." *Id.* at 30a-31a.

The arbitration agreement also contained a "Waiver of Class and Collective Claims." *Id.* at 31a. By accepting that waiver, Lewis "agree[d] that covered claims will be arbitrated only on an individual basis," and "waive[d] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* The agreement further provided that "if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction." *Id.* at 35a.

2. Lewis continued to work for Epic until December 2014. C.A. App. 9. Then, in February 2015,

Lewis sued Epic in federal court on behalf of a putative class and collective of technical communications employees, claiming that they had been denied overtime wages in violation of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, and Wisconsin law. Pet. App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing the arbitration agreement to which Lewis had consented. *Id.* Although Lewis acknowledged that his claims fell within the scope of that agreement, the District Court denied Epic's motion. *Id.* at 24a, 29a. According to the District Court, the waiver of class and collective proceedings was unenforceable because it violated the right of employees to engage in "concerted activities" under Section 7 of the NLRA. *Id.* at 25a-28a (quoting 29 U.S.C. § 157).

3. Epic appealed, *see* 9 U.S.C. § 16(a), and the Seventh Circuit affirmed.

Turning first to the NLRA, the court concluded that "[a] collective, representative, or class legal proceeding is *** a 'concerted activit[y]'" under NLRA Section 7. Pet. App. 10a (brackets in original). And because Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1), the court held that the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

Only then did the court turn to the FAA, asking whether that statute "resuscitates" the waiver. *Id.* at 12a. The court concluded that it does not, because of the FAA's saving clause. *Id.* at 15a. Under that clause, an arbitration agreement may be rendered

unenforceable by "such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 14a-15a (quoting 9 U.S.C. § 2). And according to the court, "[i]llegality is one of those grounds." *Id.* at 15a. The court thus held that the waiver was "unenforceable" even under the FAA. *Id.* at 20a. In doing so, the court acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), had come "to the opposite conclusion." Pet. App. 15a. The court nevertheless proceeded to "create a conflict in the circuits." *Id.* at 15a n.†.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals and state courts of last resort are divided, five to two, on whether the NLRA overcomes the FAA's presumption that arbitration agreements are enforceable as written, when the agreement at issue submits employment-related disputes to individual arbitration.

1. The Second, Fifth, and Eighth Circuits, as well as the Supreme Courts of California and Nevada, have each determined that provisions waiving class and collective arbitration in the employment context are enforceable under the FAA.

a. The Fifth Circuit has squarely and repeatedly upheld class waivers in employment-related arbitration agreements. Starting with *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), the court

rejected a decision by the National Labor Relations Board (NLRB or Board), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit considered and rejected the Board's determination that the FAA's saving clause was "a basis for invalidating" class waivers due to their purported illegality under the NLRA. 737 F.3d at 360. The Board's analysis was flawed, the court explained, because its finding of illegality had "the effect of *** disfavor[ing] arbitration." *Id.* at 359 (citing *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 346 (2011)). That type of illegality is not a "ground[] *** for the revocation of *any* contract," 9 U.S.C. § 2 (emphasis added); it is a ground that specifically targets arbitration, *D.R. Horton*, 737 F.3d at 360. The court therefore concluded that the defense falls outside the saving clause. *Id.*

After dispensing with the Board's reasoning, the Fifth Circuit proceeded to the analysis required by this Court's precedent in cases where a party seeks to avoid arbitration based on another federal statute such as the NLRA. The court asked whether the NLRA is "'a contrary congressional command'" that overcomes the FAA's presumption favoring arbitration. *Id.* (quoting *CompuCredit*, 132 S. Ct. at 669). The Fifth Circuit answered no: "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* In so holding, the Fifth Circuit recognized that "[e]very one of our sister circuits to consider the issue" has "held arbitration agreements containing class waivers enforceable," and the court was "loath to create a circuit split." *Id.* at 362. The proper resolution,

therefore, was straightforward: a class waiver "must be enforced according to its terms." *Id.*

The Fifth Circuit has adhered to this view consistently for the last three years. It has done so in the face of serial challenges to its decisions from the NLRB—challenges that are mounted whenever aggrieved parties elect to file petitions to review NLRB rulings in the Fifth Circuit. *See Citi Trends, Inc.* v. *NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc.* v. *NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); *Chesapeake Energy Corp.* v. *NLRB*, 633 F. App'x 613, 615 (5th Cir. 2016) (per curiam) (unpublished); *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015). *See also infra* pp. 22-24 (discussing how the NLRA's judicial review provision, 29 U.S.C. § 160(f), allows a party to petition for review of an NLRB decision in one of several different courts of appeals).

b. The Eighth Circuit also has concluded that employment arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. *See Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013); *see also* NLRB C.A. Amicus Br. 23-24 (identifying the Eighth Circuit as aligned with the Fifth Circuit). In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are unenforceable, but the court specifically "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d

at 1055. The court instead found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055.

Applying that presumption, the Eighth Circuit followed this Court's rule that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669). The two potential contrary congressional commands alleged in *Owen* were the FLSA and the NLRA. *Id.* at 1053-1054. The Eighth Circuit concluded that neither statute sufficed to "override[] the mandate of the FAA in favor of arbitration." *Id.* at 1055. Because Congress had reenacted the FAA in 1947, *after* passing both of those statutes, the court reasoned, "Congress intended its arbitration protections to remain intact even in light of the earlier passage of * * * major labor relations statutes." *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision just a few months ago, in *Cellular Sales*, 824 F.3d 772. That case came before the court of appeals on a petition to review the NLRB's ruling "'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA." *Id.* at 776. The court granted the petition in relevant part, explaining that the "holding in *Owen* is fatal" to the NLRB's position. *Id.* Under *Owen*, an "arbitration agreement that include[s] a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

c. The Second Circuit agrees with the Fifth and Eighth Circuits. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam). It too has held that a class waiver in an

employment arbitration agreement is enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). The court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. And like the Eighth Circuit before it, the Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8.[1]

d. The validity of class and collective waivers under the FAA and the NLRA has reached state courts of last resort as well. The Supreme Courts of California and Nevada have both upheld class waivers in employment arbitration agreements. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 137-143 (Cal. 2014); *Tallman* v. *Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-123 (Nev. 2015). The California Supreme Court reached its decision by adopting the Fifth Circuit's *D.R. Horton* analysis. *See Iskanian*, 327 P.3d at 141-142. And the Nevada Supreme Court did the same, citing *Iskanian*. *See Tallman*, 359 P.3d at 123.

2. On the other side of the split are the Seventh and Ninth Circuits.

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[1] Several other circuits have similarly held that the FAA demands enforcement of class waivers in employment arbitration agreements, albeit without expressly discussing the NLRA in their decisions. *See Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

a. The Seventh Circuit broke from its sister circuits in the decision below, expressly recognizing that its opinion "would create a conflict in the circuits." Pet. App. 15a n.†. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. And it determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[] *** for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

The court acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a. But the Seventh Circuit minimized the Fifth Circuit's reasoning as relying on mere "dicta" from this Court's decisions in *Concepcion* and *Italian Colors*. *Id.* As for the Second and Eighth Circuits, the panel did not dispute that these "two circuits agree with the Fifth," but it deemed the analysis from those circuits to be "substantively" insufficient. *Id.* at 19a (citing *Sutherland* and *Owen*).

b. The Ninth Circuit has now joined the Seventh. In *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), a divided panel held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. Echoing the Seventh Circuit's decision, the majority concluded that the FAA's saving clause

"caus[es] the FAA's enforcement mandate to yield" to the NLRA. *Id.* at *7. In so holding, the majority acknowledged that it was widening a circuit split: Although it "agree[d] with the Seventh Circuit," the majority "recognize[d] that [its] sister Circuits are divided on this question." *Id.* at *10 n.16.

Judge Ikuta dissented. She described the majority's decision as "breathtaking in its scope and in its error." *Id.* at *11. In her view, the NLRA was not a contrary congressional command that overrode the FAA's enforcement mandate. *Id.* at *12-*14. Judge Ikuta stressed that the majority's decision otherwise was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split." *Id.* at *11.

3. This split of authority is now fully developed, acknowledged, and ripe for resolution by this Court. The competing pronouncements from the courts of appeals and state courts of last resort have vetted the arguments on both sides. Five of these courts have upheld class and collective waivers under the FAA and the NLRA; two others have invalidated them. As more courts take a side in this dispute, the split becomes less likely to resolve itself. And because the issue is a discrete question of statutory interpretation, it is unlikely to benefit from further percolation. This Court should intervene now to resolve it.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ARBITRATION PRECEDENTS AND WAS INCORRECT.

This Court's intervention is also needed because the Seventh Circuit's decision was mistaken on the

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merits of the important question presented. The court claimed that it was "harmoniz[ing]" the FAA with the NLRA. Pet. App. 16a. Instead, it was disregarding this Court's instructions about how to interpret arbitration agreements under the FAA and misreading the NLRA to boot.

A. The FAA Controls The Enforceability Of Arbitration Agreements Absent Contrary Congressional Command.

Federal statutes are not all on equal footing when it comes to arbitration agreements. The FAA is "[t]he background law governing" questions relating to the enforcement of an arbitration provision, even when other federal statutes are at issue. *CompuCredit*, 132 S. Ct. at 668. It "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* at 669 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). More particularly, the type of arbitration "envisioned by the FAA" is "bilateral" (individual) arbitration, not class arbitration. *Concepcion*, 563 U.S. at 348, 351.

Under the FAA, the default rule is enforceability: "A written provision *** to settle by arbitration a controversy *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, "[t]he burden is on the party opposing arbitration *** to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987); *see also Moses H. Cone*, 460 U.S. at 24-25 (explaining that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable

issues should be resolved in favor of arbitration"). That is why, for decades, this Court has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Moses H. Cone*, 460 U.S. 1; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Consistent with the strong federal policy favoring arbitration, the FAA "requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226); *see Morris*, 2016 WL 4433080, at *12-*14 (Ikuta, J., dissenting). This contrary congressional command cannot be "obtuse," but rather must indicate Congress's contrary intent with some "clarity." *CompuCredit*, 132 S. Ct. at 672. And, as stated, the directive must be "congressional," *id.* at 669—not administrative or judicial.

B. The Court of Appeals Failed To Follow The Requisite *CompuCredit* Analysis.

1. The court of appeals below erred when it expressly declined to evaluate whether the NLRA is a "contrary congressional command," as *CompuCredit*

requires. *See* Pet. App. 13a. It concluded that the *CompuCredit* analysis would "put[] the cart before the horse." *Id.* The court perceived a preceding, and ultimately superseding, obligation "to see if the two statutes conflict." *Id.* Above all else, the court said, it was required to "harmonize" the FAA with the NLRA. *Id.* at 14a, 16a. In this way, the court of appeals started in the wrong place and conducted the wrong analysis—and the result of its backward methodology was to nullify, not harmonize.

The court of appeals should have begun the analysis with the FAA—specifically, the Act's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2; *CompuCredit*, 132 S. Ct. at 668-669; *Moses H. Cone*, 460 U.S. at 24-25. It should have imposed the burden on the party opposing arbitration (Lewis) to show that the agreement was unenforceable, resolving all doubts in favor of arbitration. *McMahon*, 482 U.S. at 227. And it should have asked whether the NLRA was a congressional command "contrary" to the FAA. *CompuCredit*, 132 S. Ct. at 669.

Instead, the court began with the NLRA and imposed the "burden" "to show that the FAA clashes with the NLRA" on the party seeking to enforce arbitration (Epic). Pet. App. 14a. The court also asked the wrong question: whether the NLRA's protection of employees' right to engage in "concerted activities" *could* be read to cover class and collective proceedings. *Id.* at 3a-9a. And only after the court answered the wrong question affirmatively did it consider, as a secondary inquiry, whether the FAA "resuscitates" the class waiver. *Id.* at 12a. The court's analysis thus was flawed from start to finish.

2. Under the standards this Court has laid down, the NLRA is not a "contrary congressional command" that bars class waivers in arbitration agreements. *CompuCredit*, 132 S. Ct. at 669; *see Morris*, 2016 WL 4433080, at *14-*16 (Ikuta, J., dissenting). Section 7 of the NLRA does not expressly prohibit class waivers; it grants employees the right "to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. To qualify as a contrary congressional command, therefore, Section 7 would have to actually give employees the right to arbitrate or litigate a dispute as a class or collective action. But that interpretation is not compelled by the statutory language, and it makes little sense.

If the NLRA were indeed the source of employees' putative right to proceed as a class or collective action in litigation or arbitration, employees could commence such proceedings directly under the NLRA. *See Bekele* v. *Lyft, Inc.*, No. 15-cv-11650, 2016 WL 4203412, at *20 (D. Mass. Aug. 9, 2016) (criticizing the decision below, including on this ground), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016). They presumably could have done so even before the federal rules were revised to provide for class litigation of legal claims. *See generally Italian Colors*, 133 S. Ct. at 2311 (describing the advent of Federal Rule of Civil Procedure 23). Yet there was no rush to the courthouse by employees seeking a class or collective remedy under the NLRA, then or now, because no such right exists.

Moreover, if NLRA Section 7 gives employees the right to proceed in a class or collective action, NLRA Section 8 makes it an unfair labor practice for an

employer "to interfere with" that "right[]." 29 U.S.C. § 158(a)(1). The logical consequence is that any employer opposition to employees' efforts to certify a class or collective action or arbitration "interfere[s] with" the employees' "right[]." *See id.* That would make certification of class or collective actions *automatic* when they are brought by employees against their employer. *See Bekele*, 2016 WL 4203412, at *20 (making a similar observation). Nothing in the NLRA suggests that was Congress's intended result, however. Accordingly, the NLRA does not give employees a right to proceed in class arbitration, and certainly not a right that trumps the FAA's presumption that arbitration agreements are enforceable as written.

C. The Court Of Appeals' Analysis Is Not Salvageable Through the FAA's Saving Clause.

1. The court of appeals said it found support for its decision in the FAA's saving clause, which provides that an arbitration agreement is enforceable "'save upon such grounds as exist at law or in equity for the revocation of any contract.'" Pet. App. 14a-15a (quoting 9 U.S.C. § 2). The court reasoned as follows: the class waiver here is "illegal" under Section 7 of the NLRA; "illegality" is a defense allowing for the revocation of a contract; therefore, the case falls within the FAA's saving clause, and there is no conflict between the NLRA and the FAA. *Id.* at 15a.

In this way, the court of appeals used the saving clause as a means to sidestep the analysis required by *CompuCredit*. Under its reasoning, there is never any need to determine whether another federal statute qualifies as a contrary congressional com-

mand because the saving clause allows courts to decide simply whether the other federal law *could* be interpreted to disfavor arbitration. That rule would eviscerate the presumption of enforceability created by the FAA, however, converting enforcement into the exception rather than the rule. *See Morris*, 2016 WL 4433080, at *16-*17 (Ikuta, J., dissenting).

2. The court of appeals' analysis is also wrong. The saving clause allows courts to decline to enforce arbitration agreements based on generally applicable contract defenses; that is, those that provide "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). A defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable. As *Concepcion* explained, "when a doctrine normally thought to be generally applicable, such as duress or *** unconscionability, is *** applied in a fashion that disfavors arbitration," it falls outside the saving clause. 563 U.S. at 341. Likewise, a defense that precludes the waiver of class or collective arbitration is not truly generally applicable: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; *cf. Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion*'s general analysis in a case where the law competing with the FAA was federal, and rejecting the dissent's "dismiss[al]" of *Concepcion* as "a case involving pre-emption"). *But see Morris*, 2016 WL 4433080, at *17 (Ikuta, J., dissenting) (stating that this Court "does not apply the saving[] clause to federal statutes").

The court of appeals in this case interpreted the NLRA to render class or collective waivers in employment arbitration agreements illegal. But that illegality-based defense—which arises only in *some* contracts, not "*any* contract," 9 U.S.C. § 2 (emphasis added)—can hardly be likened to classic universal defenses such as fraud and mistake. Instead, it has the effect of "conditioning enforcement of arbitration on the availability of class procedure." *Italian Colors*, 133 S. Ct. at 2312. Under *Concepcion*, that means the defense disfavors arbitration and is not generally applicable. *See* 563 U.S. at 341, 344. Accordingly, the saving clause does not apply, and the Seventh Circuit's decision is wrong on the merits.

III. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE FOR BOTH EMPLOYERS AND EMPLOYEES.

The question presented in this case holds critical importance to employers and employees around the country. Arbitration agreements with class and collective waivers are commonly used in the employment context, but the split of authority over the enforceability of those waivers creates tremendous uncertainty for employers and employees alike. And the problem is particularly acute for entities whose operations span multiple circuits.

1. The viability of class and collective arbitration waivers affects a broad spectrum of industries across the country. Consider the range of companies whose cases are part of the split of authorities: Epic (healthcare software), D.R. Horton (home construction), Murphy (convenience stores), Bristol Care (residential care services), Cellular Sales of Missouri

(telecommunications retail), Ernst & Young (professional services), Bloomingdale's (department stores), CLS Transportation (trucking), and CPS Security (security services; in *Tallman*, the Nevada Supreme Court case). Beyond those cases, class and collective arbitration waivers are used in a wide variety of employment contexts. *See, e.g.*, *Killion* v. *KeHE Distribs., LLC*, 761 F.3d 574 (6th Cir. 2014) (foodservice); *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) (automobile repair); *Raniere* v. *Citigroup Inc.*, 533 F. App'x 11 (2d Cir. 2013) (unpublished) (financial services); *Adkins* v. *Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002) (temporary staffing); *Bekele*, 2016 WL 4203412 (ride-hailing); *Bell* v. *Ryan Transp. Serv., Inc.*, No. 15-9857, 2016 WL 1298083 (D. Kan. Mar. 31, 2016) (third-party logistics); *Morvant* v. *P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012) (restaurants).

Unsurprisingly, then, the enforceability of class waivers in employment arbitration agreements is an issue that arises frequently. Since the NLRB's 2012 *D.R. Horton* decision—which declared class and collective waivers in employment arbitration agreements invalid under the NLRA—the Board has handled "a steady stream of cases, by now numerous," on the same issue. *Century Fast Foods, Inc.*, No. 31-CA-116102, 2015 WL 1885197 (N.L.R.B. Apr. 24, 2015). In just the short time since the Seventh Circuit's decision below, the Board has issued at least ten new administrative decisions applying the same view of the FAA and the NLRA that it has

advanced since 2012.[2] The NLRB's approach, combined with the continued flow of private suits, ensures that this issue will recur frequently in the federal courts.

2. The divide among the authorities on this frequently recurring question is particularly problematic because of the NLRA's judicial-review provision, 29 U.S.C. § 160(f). That provision broadly allows those aggrieved by NLRB decisions to seek review in (1) the circuit "wherein the unfair labor practice in question was alleged to have been engaged," (2) the circuit "wherein such person resides or transacts business," or (3) the D.C. Circuit. *Id.* Because "[t]he Board may well not know which circuit's law will be applied on a petition for review," *Murphy Oil*, 808 F.3d at 1018, the Board has held firm to its view that class waivers in employment arbitration agreements are unenforceable, even after its decisions have been overturned again and again by certain courts of

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[2] *See, e.g.*, *Arise Virtual Sols., Inc.*, No. 12-CA-144223, 2016 WL 4362210 (N.L.R.B. Aug. 12, 2016) (applying the Board's position and noting that "the courts of appeals are now split"); *Briad Wenco, LLC*, No. 29-CA-165942, 2016 WL 3626602 (N.L.R.B. July 6, 2016); *Grill Concepts Servs., Inc.*, 364 N.L.R.B. 36 (June 30, 2016); *Bristol Farms*, 364 N.L.R.B. 34 (July 6, 2016); *Scherzinger Corp.*, No. 09-CA-165460, 2016 WL 3383761 (N.L.R.B. June 17, 2016) (adhering to the same position and stating that the Seventh Circuit's opinion opened "a circuit split that will likely have to be resolved by the Supreme Court" (footnote omitted)); *California Commerce Club, Inc.*, 364 N.L.R.B. 31 (June 16, 2016); *SJK, Inc.*, 364 N.L.R.B. 29 (June 16, 2016); *Rim Hosp.*, No. 21-CA-137250, 2016 WL 3345349 (N.L.R.B. June 15, 2016); *Adriana's Ins. Servs., Inc.*, 364 N.L.R.B. 17 (May 31, 2016); *Lincoln E. Mgmt. Corp.*, 364 N.L.R.B. 16 (May 31, 2016).

appeals. Thus, employers located in the Second, Fifth, and Eighth Circuits will continue to be subjected to NLRB enforcement actions against their use of class waivers. And when the NLRB inevitably finds that the waivers are unenforceable, the employers must go through the hassle of filing a petition for review, even though the issue has been decided squarely in their favor in those circuits.

The Fifth and Eighth Circuits have already confronted this problem. The Fifth Circuit has rejected the Board's position in four additional cases since *D.R. Horton*. *Citi Trends*, 2016 WL 4245458, at *1 ("The Board concedes, as it must, that its order contravenes our published decisions * * * , [but] this Court is bound by its prior published decisions."); *PJ Cheese*, 2016 WL 3457261, at *1 (granting the employer's motion for summary disposition); *Chesapeake Energy*, 633 F. App'x at 615 ("[N]o intervening change in the law permits reconsideration of our precedent."); *Murphy Oil*, 808 F.3d at 1018, 1021 (neither "celebrat[ing]" nor "condemn[ing]" the Board's "nonacquiescence" to the Fifth Circuit's *D.R. Horton* decision, but rebuking the Board for "hold[ing] that an employer who followed the reasoning of [the] *D.R. Horton* decision had no basis in fact or law * * * in doing so"). The Eighth Circuit has likewise rebuffed the Board in another opinion published after *Owen*. *Cellular Sales*, 824 F.3d at 776 (noting that the Eighth Circuit had rejected the Board's request to reconsider *Owen*, a precedent that the Board recognized was "fatal" to its contentions).

Absent action by this Court, courts will continue to face repeat litigation on this question. In the meantime, Section 160(f)'s review procedures will leave

enforcement of employment arbitration agreements with class waivers uncertain for both employers and employees.

3. The proper resolution of this issue thus carries significant implications for the employer-employee relationship. Employers need to know whether class waivers in arbitration provisions will actually be enforced. Employees need to know whether they are actually bound by these provisions. Without a decision by this Court establishing a uniform rule, the law governing a given dispute will remain unclear until the case is litigated--and the place of filing dictates the rule that applies.

The split of authority is especially troublesome for companies with employees in workplaces across the United States. So long as this split persists, large employers will need to have one set of employment policies for employees in the Seventh and Ninth Circuits, and another set of policies for employees elsewhere. And even then, employers operating in California or Nevada cannot know which law will govern, because the answer will depend on whether litigation is brought in state or federal court.

In effect, the decision below "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, despite this Court's admonition that "[r]equiring the availability of classwide arbitration * * * creates a scheme inconsistent with the FAA," *Concepcion*, 563 U.S. at 344. And yet this is the choice now faced by employers in the Seventh and Ninth Circuits: if they want to resolve employment disputes through arbitration, class arbitration must be kept available. The result is a regime that—at least in those two circuits—

disfavors arbitration and the "'lower costs, greater efficiency and speed'" that attend individual arbitration, contrary to the purpose of the FAA. *Id.* at 348 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

This Court's review is therefore needed, now. Only this Court can rectify the myriad problems caused by competing standards for employment arbitration agreements. Only this Court can establish a uniform standard for employers and employees nationwide. And only this Court can bring predictability and stability back to the dispute-resolution process in employer-employee relationships.

4. Finally, this case is an excellent vehicle to decide the question presented. The question was pressed below, fully briefed by the parties and amici (including the NLRB), and passed on by the court of appeals. The question was the single issue on appeal, and the court of appeals' resolution of the issue was the sole basis for its decision. And in that decision, the court acknowledged that it was departing from the holdings of other courts of appeals.

Moreover, the parties to this case—an employer and an employee—are best situated to represent the two opposing viewpoints on the issue. They are the real parties in interest subject to both the FAA and the NLRA: their arbitration agreement is governed by the FAA, and their employer-employee relationship is governed by the NLRA. They have the most direct stake in courts' interpretations of these statutes and therefore are the parties most acutely interested in the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
131 South Dearborn Street
Chicago, IL 60603

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

SEPTEMBER 2016

Counsel for Petitioner

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 15-2997

JACOB LEWIS,

Plaintiff - Appellee,

v.

EPIC SYSTEMS CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 15-cv-82-bbc – Barbara B. Crabb, *Judge*.

ARGUED FEBRUARY 12, 2016 – DECIDED MAY 26, 2016

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and BLAKEY, *District Judge*.*

WOOD, *Chief Judge*. Epic Systems, a health care software company, required certain groups of employees to agree to bring any wage-and-hour claims against the company only through individual arbitration. The agreement did not permit collective arbitration or collective action in any other forum. We conclude that this agreement violates the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, *et seq.*, and is also unenforceable under the

*Of the Northern District of Illinois, sitting by designation.

Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.* We therefore affirm the district court's denial of Epic's motion to compel arbitration.

I

On April 2, 2014, Epic Systems sent an email to some of its employees. The email contained an arbitration agreement mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." It also said that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." Epic gave employees no option to decline if they wanted to keep their jobs. The email requested that recipients review the agreement and acknowledge their agreement by clicking two buttons. The following day, Jacob Lewis, then a "technical writer" at Epic, followed those instructions for registering his agreement.

Later, however, Lewis had a dispute with Epic, and he did not proceed under the arbitration clause. Instead, he sued Epic in federal court, contending that it had violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.* and Wisconsin law by misclassifying him and his fellow technical writers and thereby unlawfully depriving them of overtime pay. Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded

that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable. The district court agreed and denied Epic's motion. Epic appeals, arguing that the district court erred in declining to enforce the agreement under the FAA. We review *de novo* a district court's decision to deny a motion to compel arbitration. *Gore v. Alltel Commc'ns, LLC*, 666 F.3d 1027, 1033 (7th Cir. 2012).

II

A

Section 7 of the NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 enforces Section 7 unconditionally by deeming that it "shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." *Id.* § 158(a)(1). The National Labor Relations Board is "empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* § 160(a).

Contracts "stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful and may be declared to be unenforceable by the Board. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) ("[I]t will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them,

would violate the Board's order or be inconsistent with any part of it[.]"); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the [NLRA] would be reduced to a futility."). In accordance with this longstanding doctrine, the Board has, "from its earliest days," held that "employer-imposed, individual agreements that purport to restrict Section 7 rights" are unenforceable. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 at *5 (2012) (collecting cases as early as 1939), *enf'd in part and granted in part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). It has done so with "uniform judicial approval." *Id.* (citing as examples *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169, 172 (7th Cir. 1941), *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941), and *NLRB v. Adel Clay Products Co.*, 134 F.2d 342 (8th Cir. 1943)).

Section 7's "other concerted activities" have long been held to include "resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978) (collecting cases). Similarly, both courts and the Board have held that filing a collective or class action suit constitutes "concerted activit[y]" under Section 7. See *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (same); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same); *Mohave Elec. Co-op., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (single employee's

filing of a judicial petition constituted "concerted action" under NLRA where "supported by fellow employees"); *D.R. Horton*, 357 N.L.R.B. No. 184, at *2 n.4 (collecting cases). This precedent is in line with the Supreme Court's rule recognizing that even when an employee acts alone, she may "engage in concerted activities" where she "intends to induce group activity" or "acts as a representative of at least one other employee." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984).

Section 7's text, history, and purpose support this rule. In evaluating statutory language, a court asks first "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Exelon Generation Co., LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 570 (7th Cir. 2012). In doing so, it "giv[es] the words used their ordinary meaning." *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (internal citation omitted). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The NLRA does not define "concerted activities." The ordinary meaning of the word "concerted" is: "jointly arranged, planned, or carried out; coordinated." *Concerted*, NEW OXFORD AMERICAN DICTIONARY 359 (3d ed. 2010). Activities are "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *Id.* at 16. Collective or class legal proceedings fit well within the ordinary understanding of "concerted activities."

The NLRA's history and purpose confirm that the phrase "concerted activities" in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies. (There is no hint that it is limited to actions taken by a formally recognized union.) Congress recognized that, before the NLRA, "a single employee was helpless in dealing with an employer," and "that union was essential to give laborers opportunity to deal on an equality with their employer." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). In enacting the NLRA, Congress's purpose was to "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal Systems*, 465 U.S. at 835. Congress gave "no indication that [it] intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *Id.*

Collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985) (noting that the class action procedure allows plaintiffs who would otherwise "have no realistic day in court" to enforce their rights); Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1941) (noting that class suits allow those "individually in a poor position to seek legal redress" to do so, and that "an effective and inclusive group remedy" is necessary to ensure proper enforcement of rights). Given Section 7's intentionally broad sweep, there is no reason to

think that Congress meant to exclude collective remedies from its compass.

Straining to read the term through our most Epic-tinted glasses, "concerted activity" might, at the most, be read as ambiguous as applied to collective lawsuits. But even if Section 7 *were* ambiguous—and it is not—the Board, in accordance with the reasoning above, has interpreted Sections 7 and 8 to prohibit employers from making agreements with individual employees barring access to class or collective remedies. See *D.R. Horton*, 357 N.L.R.B. No. 184, at *5. The Board's interpretations of ambiguous provisions of the NLRA are "entitled to judicial deference." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992). This Court has held that the Board's views are entitled to *Chevron* deference, see *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998), and the Supreme Court has repeatedly cited *Chevron* in describing its deference to the NLRB's interpretation of the NLRA, see, *e.g.*, *Lechmere*, 502 U.S. at 536; *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987). The Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it.

Epic argues that because the Rule 23 class action procedure did not exist in 1935, when the NLRA was passed, the Act could not have been meant to protect employees' rights to class remedies. See FED. R. CIV. P. 23 (Committee Notes describing the initial 1937 version of the rule and later amendments). We are not persuaded. First, by protecting not only employees' "right to self-organization, to form, join, or assist labor

organizations, [and] to bargain collectively through representatives of their own choosing" but also "*other* concerted activities for the purpose of ... other mutual aid or protection," Section 7's text signals that the activities protected are to be construed broadly. 29 U.S.C. § 157 (emphasis added); see *City Disposal Systems*, 465 U.S. at 835. There is no reason to think that Congress intended the NLRA to protect only "concerted activities" that were available at the time of the NLRA's enactment.

Second, the contract here purports to address *all* collective or representative procedures and remedies, not just class actions. Rule 23 may have been yet to come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court: permissive joinder of parties, for instance, had long been part of Anglo-American civil procedure and was encouraged *in* 19th-century federal courts. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 7 FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2015) (noting that federal equity courts encouraged permissive joinder of parties as early as 1872). As early as 1853, it was "well established" that representative suits were appropriate "where the parties interested are numerous, and the suit is for an object common to them all." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) (allowing representative suit on behalf of more than 1,500 Methodist preachers). In fact, representative and collective legal procedures have been employed since the medieval period. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987) (discussing group litigation in England occurring as

early as 1199 C.E.). The FLSA itself provided for collective and representative actions when it was passed in 1938. See, *e.g.*, *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 n.3 (1942) (allowing suits by employees on behalf of "him or themselves and other employees similarly situated" (quoting FLSA, 29 U.S.C. § 216(b))).

Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA. The plain language of Section 7 encompasses them, and there is no evidence that Congress intended them to be excluded. Section 7's plain language controls, *GTE Sylvania*, 447 U.S. at 108, and protects collective legal processes. Along with Section 8, it renders unenforceable any contract provision purporting to waive employees' access to such remedies.

B

The question thus becomes whether Epic's arbitration provision impinges on "Section 7 rights." The answer is yes.

In relevant part, the contract states "that covered claims will be arbitrated only on an individual basis," and that employees "waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." It stipulates that "[n]o party may bring a claim on behalf of other individuals, and any arbitrator hearing [a] claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective or representative proceeding." It notes that "covered claims" include any "claimed violation

of wage-and-hour practices or procedures under local, state, or federal statutory or common law." It thus combines two distinct rules: first, any wage-and-hour dispute must be submitted to arbitration rather than pursued in court; and second, no matter where the claim is brought, the plaintiff may not take advantage of any collective procedures available in the tribunal.

Insofar as the second aspect of its provision is concerned, Epic's clause runs straight into the teeth of Section 7. The provision prohibits any collective, representative, or class legal proceeding. Section 7 provides that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. A collective, representative, or class legal proceeding is just such a "concerted activit[y]." See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D.R. Horton*, 357 N.L.R.B. No. 184, at *2-3. Under Section 8, any employer action that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]" constitutes an "unfair labor practice." 29 U.S.C. § 158(a)(1). Contracts that stipulate away employees' Section 7 rights or otherwise require actions unlawful under the NRLA are unenforceable. See *Nat'l Licorice Co.*, 309 U.S. at 361; *D.R. Horton*, 357 N.L.R.B. No. 184, at *5.

We are aware that the circuits have some differences of opinion in this area, although those differences do not affect our analysis here. The Ninth Circuit has held that an arbitration agreement mandating individual arbitration may be enforceable where the employee had the right to opt out of the agreement without penalty, reasoning that the

employer therefore did not "interfere with, restrain, or coerce" her in violation of Section 8. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014). The Ninth Circuit's decision in *Johnmohammadi* conflicts with a much earlier decision from this court, which held that contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8. See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). *Stone*, which has never been undermined, held that where the "employee was obligated to bargain individually," an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA and could not "be legalized by showing the contract was entered into without coercion." *Id.* ("This is the very antithesis of collective bargaining." (citing *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 890 (7th Cir. 1940))). The Board has long held the same. See *D.R. Horton*, 357 N.L.R.B. No. 184, at *5-7 (citing *J.H. Stone & Sons*, 33 N.L.R.B. 1014 (1941) and *Superior Tanning Co.*, 14 N.L.R.B. 942 (1939)). (In *Johnmohammadi*, the Ninth Circuit, without explanation, did not defer to the Board.) We have no need to resolve these differences today, however, because in our case, it is undisputed that assent to Epic's arbitration provision was a condition of continued employment. A contract that limits Section 7 rights that is agreed to as a condition of continued employment qualifies as "interfer[ing] with" or "restrain[ing] . . . employees in the exercise" of those rights in violation of Section 8(a)(1). 29 U.S.C. § 157(a)(1).

In short, Sections 7 and 8 of the NLRA render Epic's arbitration provision unenforceable. Even if

this were not the case, the Board has found that substantively identical arbitration agreements, agreed to under similar conditions, violate Sections 7 and 8. See *D.R. Horton*, 357 N.L.R.B. No. 184; *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *enf'd in part and granted in part, Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). We conclude that, insofar as it prohibits collective action, Epic's arbitration provision violates Sections 7 and 8 of the NLRA.

III

That would be all that needs to be said, were it not for the Federal Arbitration Act. Epic argues that the FAA overrides the labor law doctrines we have been discussing and entitles it to enforce its arbitration clause in full. Looking at the arbitration agreement, it is not clear to us that the FAA has anything to do with this case. The contract imposes two rules: (1) no collective action, and (2) proceed in arbitration. But it does not stop there. It also states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration. Since we have concluded in Part II of this opinion that the collective-action waiver is incompatible with the NLRA, we could probably stop here: the contract itself demands that Lewis's claim be brought in a court. Epic, however, contends that we should ignore the contract's saving clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus. We reject this reading of the two laws.

In relevant part, the FAA provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in "response to judicial hostility to arbitration," *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 668 (2012), its purpose was "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Federal statutory claims are just as arbitrable as anything else, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669 (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The FAA's "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses,' . . . but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

Epic argues that the NLRA contains no "contrary congressional command" against arbitration, and that the FAA therefore trumps the NLRA. But this argument puts the cart before the horse. Before we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). In order for there

to be a conflict between the NLRA as we have interpreted it and the FAA, the FAA would have to mandate the enforcement of Epic's arbitration clause. As we now explain, it does not.

A

Epic must overcome a heavy presumption to show that the FAA clashes with the NLRA. "[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Vimar Seguros*, 515 U.S. at 533 (applying canon to find FAA compatible with other statute) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). Moreover, "[w]hen two statutes complement each other"—that is, "each has its own scope and purpose" and imposes "different requirements and protections"—finding that one precludes the other would flout the congressional design. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (internal citations omitted). Courts will harmonize overlapping statutes "so long as each reaches some distinct cases." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001). Implied repeal should be found only when there is an "'irreconcilable conflict' between the two federal statutes at issue." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996) (quoting *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982)).

Epic has not carried that burden, because there is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is "no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel*

Corp. v. Mullins, 455 U.S. 72, 77 (1982). The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Illegality is one of those grounds. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006) (noting that illegality is a ground preventing enforcement under § 2). The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in "concerted activities." Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.

B

In *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit came to the opposite conclusion.† 737 F.3d at 357. Drawing from dicta that first appeared in *Concepcion*, 563 U.S. at 348, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration's "principal advantage" of informality, "makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "greatly increases risks to defendants," and "is poorly suited to the higher stakes of class litigation," the "effect of requiring

†Because this opinion would create a conflict in the circuits, we have circulated it to all judges in active service under Circuit Rule 40(e). No judge wished to hear the case en banc.

class arbitration procedures is to disfavor arbitration." *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348-52); see also *Italian Colors*, 133 S. Ct. at 2312. The Fifth Circuit suggested that because the FAA "embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 ("Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.").

There are several problems with this logic. First, it makes no effort to harmonize the FAA and NLRA. When addressing the interactions of federal statutes, courts are not supposed to go out *looking* for trouble: they may not "pick and choose among congressional enactments." *Morton*, 417 U.S. at 551. Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA.

Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other, see 29 U.S.C. § 171(b), and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58

(2009); *City Disposal Systems*, 465 U.S. at 836-37. The NLRA does not disfavor arbitration; in fact, it is entirely possible that the NLRA would not bar Epic's provision if it were included in a collective bargaining agreement. See *City Disposal Systems*, 465 U.S. at 837. ("[I]f an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, [it] is free to negotiate a provision in [its] collective-bargaining agreement that limits the availability of such methods."). If Epic's provision had permitted collective arbitration, it would not have run afoul of Section 7 either. But it did not, and so it ran up against the substantive right to act collectively that the NLRA gives to employees.

Neither *Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that an arbitration clause automatically precludes collective action even if it is silent on that point. In *Concepcion*, the Supreme Court found incompatible with the FAA a state law that declared arbitration clauses to be unconscionable for low-value consumer claims. See *Concepcion*, 563 U.S. at 340. The law was directed toward arbitration, and it was hostile to the process. Here, we have nothing of the sort. Instead, we are reconciling two federal statutes, which must be treated on equal footing. The protection for collective action found in the NLRA, moreover, extends far beyond collective litigation or arbitration; it is a general principle that affects countless aspects of the employer/employee relationship.

This case is actually the inverse of *Italian Colors*. There the plaintiffs argued that requiring them to litigate individually "contravene[d] the policies of the antitrust laws." 133 S. Ct. at 2309. The Court rejected this argument, noting that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." With regard to the enforcement of the antitrust laws, the Court commented that "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam)). In this case, the shoe is on the other foot. The FAA does not "pursue its purposes at all costs"—that is why it contains a saving clause. *Id.* If these statutes are to be harmonized—and according to all the traditional rules of statutory construction, they must be—it is through the FAA's saving clause, which provides for the very situation at hand. Because the NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement.

We add that even if the dicta from *Concepcion* and *Italian Colors* lent itself to the Fifth Circuit's interpretation, it would not apply here: Sections 7 and 8 do not mandate class arbitration. Indeed, they say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain *employers* from interfering with employees' engaging in concerted activities. See 29 U.S.C. §§ 157, 158. Sections 7 and 8 stay *Epic's* hand. (This is why, in addition to its being waived, Epic's argument that Lewis relinquished his Section 7 rights fails.) Epic acted unlawfully in attempting to contract with Lewis to waive his Section 7 rights, regardless of whether Lewis agreed to that contract. The very formation of the contract was illegal. See *Italian*

Colors, 133 S. Ct. at 2312 (Thomas, J., concurring) (noting, in adopting the narrowest characterization of the FAA's saving clause of any Justice, that defenses to contract formation block an order compelling arbitration under FAA).

Finally, finding the NLRA in conflict with the FAA would render the FAA's saving clause a nullity. See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant"). Illegality is a standard contract defense contemplated by the FAA's saving clause. See *Buckeye Check Cashing*, 546 U.S. at 444. If the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says.

Epic warns us against creating a circuit split, noting that at least two circuits agree with the Fifth. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013) (rejecting argument that there is inherent conflict between NLRA/Norris LaGuardia Act and FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (rejecting NLRA-based argument without analysis); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting "[w]ithout deciding the issue" that a number of courts have "determined that they should not defer to the NLRB's decision in *D.R. Horton*"). Of these courts, however, none has engaged substantively with the relevant arguments.

The FAA contains a general policy "favoring arbitration and a liberal federal policy favoring

arbitration agreements." *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted). Its "substantive command" is "that arbitration agreements be treated like all other contracts." See *Buckeye Check Cashing*, 546 U.S. at 447. Its purpose is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12 (holding that FAA's saving clause prevents enforcement of both void and voidable arbitration contracts). "To immunize an arbitration agreement from judicial challenge on" a traditional ground such as illegality "would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'" *Id.* (applying same principle to fraud in the inducement). The FAA therefore renders Epic's arbitration provision unenforceable.

C

Last, Epic contends that even if the NLRA does protect a right to class or collective action, any such right is procedural only, not substantive, and thus the FAA demands enforcement. The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute. See *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Employ't Relations Bd.*, 315 U.S. 740, 750 (1942) ("[Section 7] guarantees labor its 'fundamental right' to self-organization and collective bargaining." (quoting *Jones & Laughlin Steel*, 301 U.S. 1, 33)); *D.R. Horton*, 357 N.L.R.B. No. 184, at *12 (noting that the Section 7 right to concerted action "is the core substantive right protected by the NLRA and is

the foundation on which the Act and Federal labor policy rest"). That Section 7's rights are "substantive" is plain from the structure of the NLRA: Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects. Compare 29 U.S.C. § 157 with *id.* §§ 151-169. One of those rights is "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," *id.* § 157; "concerted activities" include collective, representative, and class legal proceedings. See *Eastex*, 437 U.S. at 566; *Brady*, 644 F.3d at 673; *D.R. Horton*, 357 N.L.R.B. No. 184, at *2-3.

The Supreme Court has held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). (Contrary to the Fifth Circuit's assertion in *D.R. Horton*, the Supreme Court has never held that arbitration does not "deny a party any statutory right." 737 F.3d at 357.)

Arbitration agreements that act as a "prospective waiver of a party's *right to pursue* statutory remedies" —that is, of a substantive right—are not enforceable. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19). Courts routinely invalidate arbitration provisions that interfere with substantive statutory rights. See, *e.g.*, *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623, 626 (7th Cir. 2002) (holding unenforceable arbitration agreement that did not provide for award of attorney fees in accordance with right guaranteed

by Title VII); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding unenforceable arbitration provision precluding treble damages available under federal antitrust law); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005) (holding unenforceable and severing clause in arbitration agreement proscribing exemplary and punitive damages available under Title VII); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (same); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003) (holding unenforceable arbitration agreement that limited remedies under Title VII); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (same).

Epic pushes back with three arguments, but none changes the result. It points out the Federal Rule of Civil Procedure 23 simply creates a procedural device. We have no quarrel with that, but Epic forgets that its clause also prohibits the employees from using *any* collective device, whether in arbitration, outside of any tribunal, or litigation. Rule 23 is not the source of the collective right here; Section 7 of the NLRA is. Epic also notes that courts have held that other employment statutes that provide for Rule 23 class actions do not provide a substantive right to a class action. See, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (Age Discrimination in Employment Act (ADEA)); *D.R. Horton*, 737 F.3d at 357 (citing court of appeals cases for FLSA). It bears repeating: just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process. See 29 U.S.C. §§ 216(b), 626. The NLRA does. See *id.* § 157. Epic's third argument is that

because Section 7 deals with *how* workers pursue their grievances—through concerted action—it must be procedural. But just because the Section 7 right is associational does not mean that it is not substantive. It would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, non-substantive. Moreover, if Congress had meant for Section 7 to cover only "concerted activities" related to collective bargaining, there would have been no need for it to protect employees' "right to . . . engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." 29 U.S.C. § 157 (emphasis added).

IV

Because it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA. Nothing in the FAA saves the ban on collective action. The judgment of the district court is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 15-cv-82-bbc

LEWIS, J.,
individually and on behalf of
all others similarly situated,

Plaintiff,

v.

EPIC SYSTEMS CORPORATION,

Defendant.

OPINION AND ORDER

Plaintiff J. Lewis was a technical writer for defendant Epic Systems Corporation. In this proposed collective action, plaintiff contends that defendant misclassified his position as exempt from the requirement to pay overtime wages under the Fair Labor Standards Act. Defendant has filed a motion to dismiss the case on the ground that plaintiff's claims are subject to an arbitration agreement. Dkt. #19. Plaintiff concedes that his claims fall within the scope of the arbitration agreement, but he argues that the agreement is invalid because it is unconscionable. Alternatively, he says that the court should invalidate the provision in the agreement called "Waiver of Class and Collective Claims," which requires employees to arbitrate claims "only on an individual basis."

In this case, it makes sense to consider the second argument first because it may be dispositive. As plaintiff points out, the arbitration agreement includes the following "savings clause": "[I]f the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims." Dkt. #22-1 at 3. Thus, if I conclude that the waiver is invalid, plaintiff's challenge to the rest of the arbitration agreement is moot.

As the parties acknowledge, I considered a similar waiver in an arbitration agreement in Herrington v. Waterstone Mortgage Corp., No. 11-cv-779-bbc (W.D. Wis.). In that case, the agreement stated that "[s]uch arbitration may not be joined with or join or include any claims by any persons not party to this Agreement." In an order dated March 16, 2012, I concluded that the waiver was inconsistent with In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 WL 36274, in which the National Labor Relations Board held that an employer violates the National Labor Relations Act by entering into individual arbitration agreements that include a prohibition on collective actions by employees.

The board's reasoning was straightforward. Under the NLRA, "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Both courts and the board have found consistently that lawsuits for unpaid wages brought by multiple plaintiffs may be one type of "concerted activity" protected by §§ 157 and 158(a)(1). Brady v. National

Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act."); Leviton Manufacuring Co., Inc. v. NLRB, 486 F.2d 686, 689 (1st Cir. 1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith."); Saigon Gourmet Restaurant, 353 NLRB No. 110 (2009) ("[A] wage and hour lawsuit [is] clearly protected concerted activity."); In re 127 Restaurant Corp., 331 NLRB 269, 269 (2000) (lawsuit filed on behalf of 17 employees regarding wages was protected activity); 52nd Street Hotel Associates, 321 NLRB 624, 624 (1996) (collective action brought under FLSA was protected activity), abrogated on other grounds by Stericycle, Inc., 357 NLRB No. 61 (2011); Host International, 290 NLRB 442, 443 (1988) (multiple-plaintiff lawsuit "concerning working conditions" was protected activity); United Parcel Service, Inc., 252 NLRB 1015, 1016 (1980) (class action lawsuit regarding lunch breaks is protected activity), enforced, 677 F.2d 421, 422 (6th Cir.1982); Trinity Trucking & Materials Corp., 221 NLRB 364, 364 (1975) (filing of lawsuit by group of employees for failure to pay wages in accordance with contract was protected activity), enforced, 567 F.2d 391 (7th Cir.1977).

Further, under 29 U.S.C. § 158(a)(1), employers may not "interfere with, restrain, or coerce employees in the exercise of" an employee's rights under § 157. Citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), and NLRB v. Stone, 125 F.2d 752, 756

(7th Cir.1942), the board concluded in Horton, 2012 WL 36274, at *7, that an employer interferes with an employee's right to engage in concerted activities by requiring her to sign an agreement that includes a prohibition on collective actions by employees. See also Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978) ("[T]he 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."). Finally, the board concluded that there is no conflict between the Federal Arbitration Act and the NLRA because the Federal Arbitration Act does not require the enforcement of arbitration agreements that conflict with substantive provisions of federal law.

Noting that "courts must give considerable deference to the Board's interpretations of the NLRA," ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 324 (1994), I concluded that the board's decision was "reasonably defensible" and therefore controlling. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984). Accordingly, I invalidated the waiver on collective action in the arbitration agreement and I determined that the plaintiff must be allowed to join other employees to her case. Herrington v. Waterstone Mortgage Corp., No. 11-cv-779-bbc, 2012 WL 1242318, at **6-7 (W.D. Wis. Mar. 16, 2012).

Two years later (while the case was pending before the arbitrator), the employer sought reconsideration of the decision on the ground that new case law supported a view that employees cannot rely on the NLRA to invalidate arbitration provisions that prohibit joint litigation. The employer relied

primarily on D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013), a split decision in which the Court of Appeals for the Fifth Circuit declined to enforce the board's order invalidating the waiver on collective action. Although I denied the employer's motion on procedural grounds, I also analyzed the appellate court's decision in detail. I chose to adhere to the board's decision because "the majority never persuasively rebutted the board's conclusion that a collective litigation waiver violates the NLRA and never explained why, if there is tension between the NLRA and the FAA, it is the FAA that should trump the NLRA, rather than the reverse." Herrington v. Waterstone Mortgage Corp., 993 F. Supp. 2d 940, 943-46 (W.D. Wis. 2014). Further, the other cases cited by the employer did not include additional reasoning.

In this case, defendant does not identify any way to distinguish its collective action waiver from the waiver considered in Herrington. Although defendant asks the court to "reconsider its prior deference" to the board's decision, Dft.'s Br., dkt. #20, at 10, defendant does not challenge the reasoning in Herrington or otherwise develop an argument in favor of a different result. It simply cites the cases in which courts have declined to follow the board.

As I did in Herrington, 993 F. Supp. 2d at 941, "I acknowledge that the weight of authority ... favors defendant's view.... It may be that ultimately the Supreme Court or the Court of Appeals for the Seventh Circuit will agree with defendant, but until that time, I will adhere to the decision of the board." Accordingly, I am denying defendant's motion to dismiss.

ORDER

IT IS ORDERED that defendant Epic Systems Corporation's motion to dismiss, dkt. #19, is DENIED.

Entered this 10th day of September, 2015.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

APPENDIX C

EXHIBIT A TO DECLARATION OF TINA PERKINS FILED BY EPIC SYSTEMS CORPORATION

United States District Court
Western District of Wisconsin
No. 3:15-cv-00082
Filed: 04/15/15
ECF No. 22-1

MUTUAL ARBITRATION AGREEMENT REGARDING WAGES AND HOURS

April 2, 2014

Agreement to Arbitrate. Epic Systems Corporation ("Epic") and I agree to use binding arbitration, instead of going to court, for any "covered claims" that arise or have arisen between me and Epic, its related and affiliated companies, and/or any current or former employee of Epic or a related or affiliated company. I understand that if I continue to work at Epic, I will be deemed to have accepted this Agreement.

"Covered claims" are any statutory or common law legal claims, asserted or unasserted, alleging the underpayment or overpayment of wages, expenses, loans, reimbursements, bonuses, commissions, advances, or any element of compensation, based on claims of eligibility for overtime, on-the-clock, off-the-clock or other uncompensated hours worked claims, timing or amount of pay at separation, improper deductions

of pay or paid-time-off, fee disputes, travel time claims, meal or rest period claims, overpayment claims, claims of failure to reimburse or repay loans or advances, claims over improper or inaccurate pay statements, or any other claimed violation of wage-and-hour practices or procedures under local, state or federal statutory or common law.

I understand and agree that arbitration is the only litigation forum for resolving covered claims, and that both Epic and I are waiving the right to a trial before a judge or jury in federal or state court in favor of arbitration.

The Arbitrator shall have the authority to award the same damages and other relief that would have been available in court pursuant to applicable law. The arbitrator shall follow the rules of law of the state which is the employee's principal place of work, any applicable Federal law, and the rules as stated in this Agreement. The arbitrator shall have the authority to grant any remedy or relief that the arbitrator deems just and equitable and which is authorized by and consistent with applicable law, including applicable statutory or other limitations on damages.

Waiver of Class and Collective Claims. I also agree that covered claims will be arbitrated only on an individual basis, and that both Epic and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and.any arbitrator hearing my claim may not: (i) combine more than one individual's claim or claims into a single case;

(ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding.

At Will Employment Unchanged by this Agreement. Nothing in this agreement changes or in any manner modifies my relationship with Epic of employment-at-will.

Claims not Covered by this Agreement. Covered claims under this agreement do not include claims alleging discrimination, harassment, or retaliation. Also excluded from this agreement are any claims that cannot be required to be arbitrated as a matter of law. I also understand that I am not barred from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board or Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim with respect to covered claims, though I am giving up the opportunity to recover monetary amounts from any such governmental agency related claim (e.g., NLRB or EEOC) and would instead be able to pursue a claim for monetary amounts through arbitration. I also understand that if a third party seeks to have Epic garnish my wages, I may be subject to third-party garnishment proceedings in court, even though such a dispute concerns my wages.

Right to Representation. Both Epic and I shall have the right to be represented by an attorney in arbitration. Neither side is entitled to its attorneys' fees except as provided for by applicable law.

How to File for Arbitration. To file a demand for arbitration:

1. The party desiring to pursue a legal dispute must prepare a written demand setting forth the claim(s). Epic will pay its own filing fees. If I initiate the arbitration, I will pay the lesser of the American Arbitration Association's then-current filing fee (as of this date, $200), or the then-current filing fee applicable in state court.
2. The employment dispute resolution rules of the American Arbitration Association ("AAA") effective at the time of my filing will apply. The current version of the rules can be found on pages 15-31 here: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased. These rules are modified by the terms of this Agreement, including the following:
   a. Epic will pay the arbitrator's fees and the arbitration filing and administrative fees, less my initial payment for the applicable filing fee;
   b. Epic and I will each have the opportunity to "rank" our preference for the appointed arbitrator from a list of nine proposed arbitrators and the AAA will then appoint the arbitrator;
   c. The arbitrator shall have the authority to issue an award or partial award without conducting a hearing on the grounds that there is no claim on which relief can be granted or that there is no genuine issue of material fact to resolve at a hearing, consistent with Rules 12 and 56 of the Federal Rules of Civil Procedure ("FRCP");

d. Each party shall be entitled to only one interrogatory limited to the identification of potential witnesses, in a form consistent with Rule 33 of the FRCP;

e. Each party shall be entitled to only 25 requests for production of documents, in a form consistent with Rule 34 of the FRCP;

f. Each party shall be entitled a maximum of two (2) eight-hour days of depositions of witnesses in a form consistent with Rule 30 of the FRCP;

g. The arbitrator shall decide all disputes related to discovery and to the agreed limits on discovery and may allow additional discovery upon a showing of substantial need by either party or upon a showing of an inability to pursue or defend certain claims without such additional discovery;

h. The arbitrator must issue a decision in writing, setting forth in summary form the reasons for the arbitrator's determination and the legal basis therefor; and

i. The arbitrator's authority shall be limited to deciding the case submitted by the parties to the arbitration. Therefore, no decision by any arbitrator shall serve as precedent in other arbitrations except in a dispute between the same parties, in which case it could be used to preclude the same claim from being re-arbitrated.

Settlement. I may settle any dispute with the company at any time without involvement of the arbitrator.

Modifications and Amendments. I understand and agree that Epic may change or terminate this agreement after giving me 90 days written or electronic notice. Any change or termination will not apply to a pending claim.

Savings Clause & Conformity Clause. If any provision of this agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision, and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive forum for such claims.

Controlling Law. I agree that this agreement is made pursuant to and shall be governed under the Federal Arbitration Act.

RECORD
AND
BRIEFS

No. 16-285

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
PETITIONER

v.

JACOB LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID C. ZOELLER
Counsel of Record
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

[Additional Counsel Listed on Inside Cover]

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street,
Suite 401M - 250
Minneapolis, MN
55415
(612) 927-2969

QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. § 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2.

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BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

This case involves both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA). Two provisions of the NLRA are at issue. The first, section 7 of the NLRA, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

The second, section 8(a) of the NLRA, 29 U.S.C. § 158(a), states:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

The FAA provision at issue, 9 U.S.C. § 2, states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or

any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory Background

1. In the NLRA, 29 U.S.C. §§ 151 *et seq.*, Congress articulated "the policy of the United States" of encouraging collective bargaining and "protecting the exercise by workers of full freedom of association." 29 U.S.C. § 151. Section 7 of the NLRA expressly provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." *Id.* § 157. This Court has described the rights under section 7 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

In addition, the NLRA provides that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" commits an unfair labor practice, 29 U.S.C. § 158(a)(1), and this Court has held that the "acts which constitute the unfair labor practice [are] unlawful," *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 436 (1941).

2. The FAA, 9 U.S.C. §§ 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

B. Factual Background And Court Proceedings

1. On April 2, 2014, petitioner Epic Systems Corporation (Epic), a healthcare software company, sent an email containing an arbitration agreement to some of its employees, including respondent Jacob Lewis. Pet. App. 1a-2a. The agreement required employees to bring all wage-and-hour claims through individual arbitration and stated that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a. The agreement included a clause stating that if the "Waiver of Class and Collective Claims" was deemed unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." *Ibid.* It also stated that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." *Ibid.* (brackets in original). The email requested that recipients review the terms and acknowledge their acceptance by clicking two buttons. *Ibid.* The next day, Jacob Lewis, then a "technical writer" at Epic, did so. *Ibid.* "Epic gave employees no option to decline [the agreement] if they wanted to keep their jobs." *Ibid.*

2. In February 2015, Lewis sued Epic in federal court on behalf of a putative class of technical writers. Pet. 5-6. He alleged that Epic had misclassified those employees under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (FLSA), and Wisconsin law, Pet. App. 2a, thereby denying them required overtime pay, *id.* at 24a. Epic moved to dismiss the complaint, arguing that Lewis, through the arbitration agreement, had waived his right to bring in court any claim involving the payment of wages and any right to participate in class actions. *Ibid.*; *id.* at 2a. Lewis responded that the agreement was unenforceable because, among other reasons, it interfered with employees' right to engage in "concerted activities" under section 7 of the NLRA. *Id.* at 2a-3a. He also argued that pursuant to the arbitration agreement's own savings clause his class suit was properly brought in federal court. *Id.* at 25a. The district court agreed, relying on its own precedent in *Herrington* v. *Waterstone Mortgage Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012), and denied Epic's motion to dismiss. Pet. App. 28a.

3. Epic appealed. It "argu[ed] that the district court erred in declining to enforce the agreement under the FAA." Pet. App. 3a. The Seventh Circuit, however, unanimously rejected its argument. The court noted first that section 7 of the NLRA provides that "employees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection;" that section 8 "enforces Section 7 unconditionally by deeming that it 'shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of

the rights guaranteed in [section 7];'" and that "the [National Labor Relations] Board [(NLRB)] has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights are unenforceable'" and has done so "with 'uniform judicial approval.'" *Id.* at 3a-4a. "[B]oth courts and the [NLRB]," the court added, "have held that filing a collective or class action suit constitutes 'concerted activit[y]' under Section 7." *Id.* at 4a (brackets in original).

"Section 7's text, history, and purpose," the court argued, "support this rule." Pet. App. 5a. "Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities,'" *ibid.*, the relevant statutory term, and "[t]he NLRA's history and purpose confirm that the phrase * * * should be read broadly to include resort to representative, joint, collective, or class legal remedies," *id.* at 6a. "Collective * * * legal remedies," the court reasoned, "allow employees to band together and thereby equalize bargaining power." *Ibid.*

The court alternatively held that "even if Section 7 *were* ambiguous—and it is not"—the NLRB's interpretation is "entitled to *Chevron* deference." Pet. App. 6a. (citation omitted). The court considered the NLRB's longstanding interpretation of sections 7 and 8 as "prohibit[ing] employers from making agreements with individual employees barring access to class or collective remedies," concluding that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Id.* at 7a.

With these legal principles established, the court found that "[t]he question thus becomes whether Epic's arbitration provision impinges on 'Section 7 rights.' The answer is yes." Pet. App. 9a. The collective action ban, it held, "runs straight into the teeth of Section 7" and is therefore "unenforceable." *Id.* at 10a.

The court then turned to Epic's FAA arguments. First, it noted, "it is not clear to us that the FAA has anything to do with this case." Pet. App. 12a. Since the contract "states that if the collective-action waiver is unenforceable, then any collective claim must proceed in court, not arbitration[,] * * * we could probably stop here: the contract itself demands that Lewis's claim be brought in a court." *Ibid.* The court nonetheless proceeded to consider—and reject—Epic's argument that it "should ignore the contract's [own] savings clause because the FAA trumps the NLRA." *Ibid.*

"[T]his argument," the court noted, "puts the cart before the horse." Pet. App. 13a. As the court explained, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Ibid.* Because the FAA's own saving clause forecloses arbitration "upon such grounds as exist at law or in equity for the revocation of any contract [and i]llegality is one of those grounds[, a] contract provision[ ] like Epic's, which strip[s] away employees' rights to engage in 'concerted activities' * * * is illegal, and meets the criteria of the FAA's saving clause for nonenforcement." *Id.* at 15a (internal citation omitted). "[T]here is no conflict [in this case] between the NLRA and the FAA, let alone

an irreconcilable one," the court held. *Id.* at 14a. "Here the NLRA and the FAA work hand in glove." *Id.* at 15a.

Next, the court acknowledged and rejected the Fifth Circuit's "opposite conclusion" in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) (*Horton II*). Pet. App. 15a. "There are," it noted, "several problems with [the Fifth Circuit's] logic." *Id.* at 16a. For starters, the Seventh Circuit pointed out, "[*Horton II*] makes no effort to harmonize the FAA and NLRA." *Ibid.* "Indeed, finding the NLRA in conflict with the FAA would be ironic considering that the NLRA is in fact *pro*-arbitration: it expressly allows unions and employers to arbitrate disputes between each other and to negotiate collective bargaining agreements that require employees to arbitrate individual employment disputes." *Ibid.* (internal citation omitted). Second, the court noted, "Sections 7 and 8 * * * say nothing about class arbitration, or even arbitration generally. Instead, they broadly restrain *employers* from interfering with employees' engaging in concerted activities." *Id.* at 18a. Third, it held, "finding the NLRA in conflict with the FAA would render the FAA's saving clause a nullity." *Id.* at 19a. As the court explained, "[i]f the NLRA does not render an arbitration provision sufficiently illegal to trigger the saving clause, the saving clause does not mean what it says." *Ibid.* The Seventh Circuit declined to address the other courts of appeals' decisions Epic cited, noting that "none has engaged substantively with the relevant arguments." *Ibid.*

Finally, the court rejected Epic's argument that section 7's right to collective action "is procedural only,

not substantive, and thus the FAA demands enforcement." Pet. App. 20a. "The right to collective action," it stated, "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." *Ibid.* In fact, it held, "Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects." *Id.* at 21a.

The Seventh Circuit therefore affirmed the judgment of the district court. *Id.* at 23a. Epic petitioned for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to review "whether Section 7 of the NLRA, which gives employees the right to 'engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection,' qualifies as a contrary congressional command sufficient to overcome the FAA's presumption" favoring arbitration." The courts below, however, decided a quite different question: whether the FAA's saving clause bars enforcement of a collective-action waiver that violates section 7 of the NLRA. Because petitioner misunderstands what the lower courts decided, it (1) mischaracterizes and exaggerates any split, (2) fails to address the merits of the issue the courts below actually did consider, (3) spins as "important and recurring," Pet. 4, an issue missing from the case, and (4) ignores several defects that make this case a poor vehicle to review the question it might actually present, let alone one it does not.

I. The Actual Split Is Shallow And May Resolve Itself Without This Court's Intervention

Petitioner claims that the courts of appeals are split "five to two" with the "Second, Fifth, and Eighth Circuits, as well as the Supreme Courts of California and Nevada," enforcing collective-action waivers and "the Seventh and Ninth Circuits" "[o]n the other side." Pet. 7, 11. This characterization overclaims by much. More careful evaluation reveals a shallower, less clear split that may well resolve itself without this Court's intervention.

Framing the issue correctly—as the Seventh and Ninth Circuits have done—largely dispels petitioner's alleged conflict. The proper question (the "saving-clause question") is (1) whether the NLRA makes collective-action waivers illegal and (2), if so, whether the FAA's saving clause nonetheless requires their enforcement. See *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *7-8 (9th Cir. Aug. 22, 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); Pet. App. 12a-15a. Most of the decisions petitioner discusses concern a quite different question: whether the NLRA or other statutes, particularly the FLSA, represent a "contrary congressional command," *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987), overriding the FAA. The saving-clause question, unlike the congressional-command question, does not ask whether the FAA stands in intractable conflict with another statute and, if so, which trumps. Rather, it asks whether the FAA's own saving clause renders particular contract provisions made illegal by another statute unenforceable under the FAA. Pet. App. 15a. Only three circuits have

analyzed and addressed *this question*. The Fifth Circuit has held that the FAA's saving clause requires enforcement of such provisions; the Seventh and Ninth Circuits have held that it bars their enforcement.

Petitioner mischaracterizes the depth of the split because it confuses these two different arguments. The "[i]mportant and recurring question," Pet. 4, it discusses is whether the NLRA represents a contrary congressional command, an issue the Seventh Circuit never decided, see pp. 4-8, *supra*; pp. 30-31, *infra*, not whether the FAA's saving clause independently forecloses enforcement of the collective-action waiver. The petition itself, in fact, makes this framing unmistakeably clear. It describes the "question presented [as] ask[ing] whether Section 7 of the NLRA * * * qualifies as a *contrary congressional command* sufficient to overcome the FAA's presumption that these agreements should be enforced according to their terms." Pet. 3 (emphasis added).

1.a. Petitioner relies mistakenly on *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), to demonstrate that the Eighth Circuit supports its "side" of the claimed split. Pet. 9-10. First, *Owen* involved a different statute, the FLSA, not the NLRA. The Eighth Circuit's analysis focused on whether there is an "inconsistency between either the FLSA text or its legislative history and the conclusion that arbitration agreements containing class waivers are enforceable in cases involving the FLSA." *Owen*, 702 F.3d at 1053. Finding none, it upheld the waiver at issue in the case. *Id.* at 1052-1053. In other words, the Eighth Circuit analyzed whether the FLSA contained a "contrary congressional command"

overriding the FAA. It nowhere mentioned, let alone analyzed, the FAA's saving clause and, although it discussed the NLRB's decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) (*Horton I*), the court distinguished it as "limited * * * to arbitration agreements barring *all* protected concerted action," *Owen*, 702 F.3d at 1053, and notably refused the employee's "invitation to follow [*Horton I*]'s rationale" "given the absence of any '*contrary congressional command*' from the FLSA" to override the FAA, *id.* at 1055 (emphasis added).[1] To the extent the court weighed saving-clause concerns at all, it did so only in aid of a larger congressional-command argument and only in passing.

b. As petitioner observes, "[t]he Second Circuit agrees with the [Eighth]," Pet. 10, and thus suffers from the same weakness. Like *Owen*, *Sutherland* v. *Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam), nowhere mentioned the FAA's saving clause. Also, like *Owen*, it upheld the arbitration agreement largely because it found no "contrary congressional command" in the FLSA that would override collective action waivers. *Id.* at 295-297 (quoting *McMahon*, 482 U.S. at 226). The only time the opinion might possibly

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[1] For similar reasons, petitioner's other Eighth Circuit authority, *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772 (8th Cir. 2016), does not help its cause. That case held that a collective-action waiver did not violate the NLRA without ever substantively evaluating any saving-clause argument or determining the proper relationship between the NLRA and the FAA. See *id.* at 776-778 (failing to mention or cite to FAA). In reaching its holding, moreover, *Cellular Sales* relied entirely on *Owen*, *id.* at 776 (noting that "our holding in Owen is fatal to [the NLRB's] argument"), which never decided these issues.

reference a saving-clause argument occurs in a single oblique sentence in which, quoting *Owen*, it "decline[s] to follow [*Horton I* because e]ven assuming that '[it] addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.'" *Id.* at 297 n.8 (quoting *Owen*, 702 F.3d at 1053-1054). But that oblique reference is unclear. *Horton I* made both saving-clause and congressional-command arguments under the NLRA. See *Horton I*, 357 N.L.R.B. at 2287-2288. *Sutherland* is thus best understood as analyzing the saving-clause argument the same way as *Owen*, the sole authority it quoted, did—as, at most, one small part of a congressional-command argument rather than as a saving-clause argument standing on its own.[2]

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[2] Petitioner has not discussed *Patterson* v. *Raymours Furniture Company*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 2, 2016) petition for cert. pending, No. 16-388 (filed Sept. 22, 2016), a non-precedential summary order filed by the Second Circuit on the same day petitioner filed its petition for certiorari. That order held that "[a]lthough the *Sutherland* court rejected *Horton I* in a brief footnote, it unquestionably rejected the NLRB's analysis and embraced the Eighth Circuit's position in *Owen*." *Id.* at *3. That careful characterization indicates that the *Patterson* panel believed that *Sutherland* had enforced the collective-action waiver because of "the absence of any 'contrary congressional command' from the FLSA," *Owen*, 702 F.3d at 1055, which is as far as *Owen* reached, not that it decided any saving-clause question. Such a view is completely consistent with "reject[ing] the NLRB's analysis" in *Horton I*, which covered, among other things, the congressional-command argument. Even if the *Patterson* panel did wrongly believe that the *Sutherland* court had decided the saving-clause claim, its view has no effect within the Second Circuit going forward. A non-precedential summary order cannot put an authoritative gloss, especially a mistaken

c. Unlike the Eighth and Second Circuits, the Fifth Circuit *has* rejected the freestanding saving-clause argument. In *Horton II*, it identified two separate reasons why a collective-action waiver might not be enforceable under the FAA—"(1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's 'saving clause' and (2) application of the FAA may be precluded by another statute's contrary congressional command," 737 F.3d 344, 358 (5th Cir. 2013) (internal citation omitted)—and analyzed each independently, *ibid.* ("The Board clearly relied on the FAA's saving clause. Less clear is whether the Board also asserted that a contrary congressional command is present. We consider each exception."); *id.* at 358-362 (analyzing each claim). *Horton II* held that this Court's decision in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), barred the saving-clause claim. "Like the statute in *Concepcion*," it stated, "the Board's interpretation is facially neutral [but its] effect * * * is to disfavor arbitration." *Horton II*, 737 F.3d at 359. Thus, because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA[, t]he saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 360. The Fifth Circuit is the only circuit that has clearly rejected an independent saving-clause claim.[3]

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one, on a precedential opinion. It represents *at most* what one non-precedential panel thought a prior precedential panel had held.

[3] Petitioner also claims that two state supreme courts have sided with the Fifth Circuit. Pet. 11. Petitioner gets things at best half

2. Petitioner is correct that the Seventh and Ninth Circuits disagree with the Fifth. Pet. 11. Both hold that (1) the NLRA makes collective-action waivers in employment agreements illegal and (2) the FAA's saving clause therefore bars their enforcement. Pet. App. 15a ("Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement."); *Morris*, 2016 WL 4433080, at *8 ("[W]e join the Seventh Circuit in treating the

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right. In *Iskanian* v. *CLS Transportation Los Angeles, LLC*, the California Supreme Court "agree[d] with the Fifth Circuit that, in light of *Concepcion*, the Board's rule is not covered by the FAA's savings [sic] clause." 327 P.3d 129, 141 (Cal. 2014). At the same time, however, that court correctly identified the Eighth and Second Circuits, on which it relied, as having weighed in on a different matter: "We * * * conclude * * * that sections 7 and 8 of the NLRA do not represent 'a contrary congressional command' overriding the FAA's mandate." *Id.* at 142 (citing *Sutherland*, 726 F.3d at 297 n.8, and *Owen*, 702 F.3d at 1053-1055).

In *Tallman* v. *Eighth Judicial District Court*, 359 P.3d 113 (Nev. 2015), the Nevada Supreme Court took a somewhat different approach. It correctly recognized the Fifth Circuit in *Horton II* as having rejected both the freestanding saving-clause claim and the claim that the FAA was "overridden by a contrary congressional command," *id.* at 123, but then its own opinion went on to reject only the argument that "the NLRA cannot fairly be taken as a 'contrary congressional command' sufficient * * * to override the FAA," *ibid.*, and it cited as authority only that portion of the California Supreme Court's opinion dealing with the congressional-command issue, *ibid.* (citing *Iskanian*, 327 P.3d at 142). It then identified the Eighth and Second Circuits as supporting only the view that "the NLRA cannot fairly be taken as a 'contrary congressional command' sufficient * * * to override the FAA," *ibid.* (citing *Sutherland*, 726 F.3d at 297 n.8, and *Owen*, 702 F.3d 1053-1055), not any holding concerning the saving clause.

interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents enforcement of that waiver."). In particular, both held that the NLRA's bar to collective-action waivers does not disfavor or target arbitration, as the Fifth Circuit claimed, and thus does not fall outside the scope of the saving clause. Pet. App. 16a-19a; *Morris*, 2016 WL 4433080, at *10 ("At its heart, this is a labor law case, not an arbitration case." "The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards to resolve workplace disputes.").

3. When the Eighth, Second, and Fifth Circuits decided *Owen*, *Sutherland*, and *Horton II*, respectively, there was no circuit split—actual or perceived—and only one of those circuits, the Fifth, squarely decided the saving-clause issue. Since then, however, both circuits that have considered this issue for the first time have disagreed with the Fifth. The Seventh and Ninth Circuits have also made clear that saving-clause claims are different from claims asserting that the NLRA represents a "contrary congressional command" overruling the FAA and must be analyzed independently. Because the prior cases relied on a misplaced "consensus" at the time, *Sutherland*, 726 F.3d at 296, and because the Seventh and Ninth Circuits have now expressly addressed the NLRA saving-clause question and gone against the Fifth Circuit, the courts may resolve any conflict on their own without this Court's intervention. See Fed. R. App. P. 35.

The Fifth Circuit, in fact, expressly relied on this misplaced "consensus" in deciding *Horton II*. It was "loath," it stated, "to create a circuit split." *Horton II*, 737 F.3d at 362 (citing *Sutherland*, 726 F.3d at 297–298 & n.8, and *Owen*, 702 F.3d at 1055). It failed to notice, however, that the Eighth and Second Circuit cases it cited rested only on congressional-command, not saving-clause arguments, see pp. 9-11, *supra*. As the Seventh Circuit noted, the Eighth and Second Circuit cases nowhere "engaged substantively with the relevant [saving-clause] arguments." Pet. App. 19a. The Fifth Circuit's concerns about a split, then, were misguided at the time but ironically valid today. The Fifth Circuit now represents a minority view of one. It may thus—through an en banc proceeding—undo the same split it was "loath to create." *Horton II*, 737 F.3d at 362.

The Fifth Circuit denied a petition for rehearing of *Horton II* on April 16, 2014, *Horton* II, 737 F.3d 344 (5th Cir. 2013), reh'g denied, No. 12-60031 (Apr. 16, 2014); see *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016), but that was before the Seventh and Ninth Circuit decisions. Only after the Seventh Circuit issued its decision in this case would the Fifth Circuit have had any reason to reconsider the panel decision in *Horton II*. Since then, however, no one has asked it to reconsider *Horton II* en banc. Likewise, the Second Circuit in its non-precedential summary order in *Patterson* stated that "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and

Morris, to join the Seventh and Ninth Circuits and hold that the * * * waiver of collective action is unenforceable." 2016 WL 4598542, at *2. Even if the *Patterson* court erroneously believed that *Sutherland* had decided the saving-clause question, see n. 2, *supra*, it correctly noted that an en banc proceeding could clear up any confusion, *Patterson*, 2016 WL 4598542, at *2.

In any event, further percolation would be helpful to this Court. Because none of those courts upholding collective-action waivers against saving-clause challenges had the benefit of the Seventh and Ninth Circuits' reasoning, and all but one of those courts had either failed to consider saving-clause claims at all or considered them only in aid of upholding a larger contrary-congressional-command argument, see pp. 9-15, *supra*, the issue warrants further development in the lower courts. This Court would benefit from further discussion in the courts of appeals and state supreme courts that actually focuses on the question presented. And there will be no shortage of appropriate vehicles now that the Seventh and Ninth Circuits have identified the proper issue. See, *e.g.*, *Bekele* v. *Lyft, Inc.*, No. 15-11650-FDS, 2016 WL 4203412 (D. Mass. Aug. 9, 2016) (upholding collective action waiver), *appeal docketed*, No. 16-2109 (1st Cir. Aug. 30, 2016).

II. The Decision Below Is Correct

A. The Seventh Circuit Correctly Determined That Epic's Waiver Of Class And Collective Claims Is Unlawful Under Sections 7 & 8 Of The NLRA

The Seventh Circuit correctly determined that section 7 of the NLRA grants employees a substantive right to pursue "representative, joint, collective, or class legal remedies." Pet. App. 6a. Both the plain language and purpose of the NLRA, as well as this Court's and the NLRB's interpretations of section 7, support this conclusion.

First, section 7 provides that "[e]mployees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added). This Court has explained that section 7's reference to "other concerted activities" protects employees "seek[ing] to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). As a result, both courts and the NLRB have consistently held that section 7 includes a right to collectively pursue work-related legal claims. See, *e.g.*, *Brady* v. *Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the [NLRA]."); *Altex Ready Mixed Concrete Corp.* v. *NLRB*, 542 F.2d 295, 296-297 (5th Cir.

1976) (same); *Leviton Mfg. Co.* v. *NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

The judicial consensus favoring a right to engage in collective legal action is unsurprising given the plain language of section 7. This Court has instructed that "[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When interpreting the language of a statutory provision, the court "giv[es] the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)).

The ordinary meaning of "concerted" is "jointly arranged, planned, or carried out; coordinated." *New Oxford American Dictionary* 359 (3d ed. 2010); see also *Webster's Third New International Dictionary, Unabridged* (2016), http://unabridged.merriam-webster.com/unabridged/concerted (defining "concerted" as "performed in unison"). "Activities" are generally understood as "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *New Oxford American Dictionary* 16 (3d ed. 2010); see also *Webster's Third New International Dictionary, Unabridged* (2016), http://unabridged.merriam-webster.com/unabridged/activity (defining "activity" as "an occupation, pursuit, or recreation in which a person is active"). Similarly, *Black's Law Dictionary* defines "concerted activity" as "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed to achieve an objective." *Black's Law*

Dictionary 349 (10th ed. 2014). Thus, while the NLRA does not define "concerted activities," collective legal action fits easily within the term's ordinary meaning.

Second, the NLRA's underlying purpose further supports an interpretation of "concerted activities" that includes collective legal action. Congress enacted section 7 "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Collective legal remedies level the playing field exactly as Congress intended: they equalize employer-employee disputes by allowing employees to band together in confronting their employer. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985) (explaining how class action procedures allow plaintiffs who otherwise would "have no realistic day in court" to enforce their rights). This Court has found, moreover, "no indication that Congress intended to limit [section 7's] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal Sys.*, 465 U.S. at 835. Adopting this Court's inclusive understanding of section 7, the court below appropriately concluded that "other concerted activities" include collective legal action. Pet. App. 4a-7a.

Third, the NLRB has interpreted section 7 to include a right to engage in collective legal action and the Board's interpretation is entitled to deference. This Court has "often reaffirmed that the task of defining the scope of [section] 7 'is for the [NLRB] to

perform in the first instance as it considers the wide variety of cases that come before it.'" *City Disposal Sys.*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) (noting that the NLRB's interpretations of ambiguous provisions of the NLRA are entitled to "considerable deference"). This Court has, moreover, repeatedly reviewed the NLRB's interpretations of the NLRA under the framework established in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 536 (1992); *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). Under *Chevron*, the court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the court concludes that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. If the statute is "silent or ambiguous" with respect to the question at issue, the question is whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

Here, Congress has unambiguously "spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Both the plain language and purpose of the NLRA support an interpretation of "concerted activities" that includes collective legal action. See pp., 18-20, *supra*. Even if one strained to find ambiguity where none exists, however, the NLRB has interpreted section 7 to include a right to engage in collective legal action. See *Horton I*, 357 N.L.R.B. 2277, 2281 (2012) ("[T]he substantive right to engage in concerted activity aimed

at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7."). To the extent Congress left any ambiguity, the Board's interpretation is eminently reasonable and thus "entitled to judicial deference." *Lechmere*, 502 U.S. at 536.

Furthermore, section 7's enforcement provision, section 8 of the NLRA, makes clear that contractual provisions that conflict with section 7 are unlawful. Section 8 declares that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1). This Court has held that contracts that "stipulate[] for the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful. *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 361 (1940). In particular, in *National Licorice Co.*, this Court held that individual contracts in which employees prospectively waived their right to present grievances "in any way except personally" were unenforceable as "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361. The Court further explained in *J.I. Case Co.* v. *NLRB* that "[w]herever private contracts conflict with [the NLRB's] functions, they obviously must yield or the [NLRA] would be reduced to a futility." 321 U.S. 332, 337 (1944); see also *ibid.* ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act."). In accordance with this inescapable

principle, the courts have, since the NLRB's earliest days, uniformly approved its decisions that contracts violating the NLRA are unlawful. See, *e.g.*, *NLRB* v. *Adel Clay Products Co.*, 134 F.2d 342, 345-346 (8th Cir. 1943); *NLRB* v. *Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941).

Epic's "Waiver of Class and Collective Claims" unambiguously violates section 8 by "interfer[ing] with" and "restrain[ing]" its employees' section 7 right to pursue collective legal action. 29 U.S.C. § 158(a)(1). For covered claims, the collective-action waiver prohibits employees from "participat[ing] in or receiv[ing] money or any other relief from any class, collective, or representative proceeding." Pet. App. 31a. One could scarcely imagine terms that more directly conflict with employees' right to pursue collective legal action under section 7. See *Eastex*, 437 U.S. at 565-566 (recognizing that section 7 protects employees "seek[ing] to improve working conditions through resort to administrative and judicial forums"). The waiver is therefore unlawful as an "unfair labor practice" under section 8 of the NLRA. 29 U.S.C. § 158(a)(1).

B. The FAA's Saving Clause Does Not Require Enforcement Of Arbitration Provisions That Violate Federal Statutes Such As The NLRA

The court of appeals was also correct in concluding that because Epic's contract violated the NLRA it was an unenforceable illegal contract falling squarely within the FAA's saving clause.

It is a fundamental principle of contract law that illegal promises cannot be enforced. See, *e.g.*, Restatement (Second) of Contracts § 178 (Am. Law. Inst. 1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable."). This Court has unequivocally held that "our cases leave no doubt that illegal promises will not be enforced in cases controlled by * * * federal law," *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77 (1982), and that "court[s] ha[ve] a duty to determine whether a contract violates [the] law *before* enforcing it," *id.* at 83 (emphasis added).

Wisconsin contract law, moreover, which governs the dispute in question, holds that "[t]he general rule of law is, that all contracts which are * * * contrary to the provisions of any statute, are void." *Melchoir* v. *McCarty*, 31 Wis. 252, 254 (1872); *Roberts* v. *T.H.E. Ins. Co.*, 879 N.W. 2d 492, 502 (Wis. 2016). Under generally applicable state law, then, the agreement between petitioner and respondent was a legal nullity. Respondent cannot be forced into non-collective arbitration based on an agreement which never had legal effect under the contract law of the state.

The FAA does not mandate the enforcement of illegal promises such as the one at the center of this dispute. Foreseeing potential conflicts between the FAA and other statutes, Congress included a saving clause which states that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). Thus, when an arbitration provision violates federal law, the

saving clause "prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield." *Morris* v. *Ernst & Young*, LLP, 2016 WL 4433080, at *7 (9th Cir. Aug. 22, 2016).

The saving clause recognizes a general defense of illegality. This Court has stated that the saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses," but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). Here, the contract defense of illegality does not apply only to arbitration or focus on the fact that an agreement to arbitrate is at issue. The problem with the collective-action waiver is not that it requires arbitration as a forum, but rather that it forbids collective action in *any* forum in violation of the NLRA. Asserting illegality under the NLRA, moreover, hardly disfavors arbitration. A contract forbidding collective action in court (without mentioning arbitration) would be equally invalid. Because the defense of illegality is a "generally applicable contract defense" that does not attack the arbitration clause itself, it falls squarely within the FAA's saving clause.

Nor can the collective-action waiver be saved, as one of petitioner's amici suggests, by calling it a "procedural," rather than a "substantive," provision. Pacific Legal Foundation Amicus Br. 5-8 (arguing that collective-action waivers are mere procedural rights which can be waived in arbitration). This Court has made clear that the FAA does not permit the

enforcement of contract terms that waive substantive rights. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."). Here, the rights granted by section 7 of the NLRA are clearly substantive. In distinguishing between the substantive and procedural protections of federal statutes, this Court has focused on the statutes' text, structure, and central purpose. See, *e.g.*, *CompuCredit*, 132 S. Ct. at 669-671 (judicial-forum provision not "principal substantive provision[]" of the Credit Repair Organizations Act); *Rodriquez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (judicial-forum and venue provisions in Securities Act not "so critical that they cannot be waived"); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726-727 (1988) (characterizing statutes of limitation as "procedural" for choice-of-law purposes but as "substantive" for *Erie*-doctrine purposes); *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109-110 (1945) (noting that a right to avoid litigation under a statute of limitations could be considered substantive); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (holding that a burden of proof standard was substantive rather than procedural).

The text of the NLRA itself reflects the Act's substantive character, granting the "*[r]ight* of employees as to organization." 29 U.S.C. § 157 (emphasis added). And as the structure of the NLRA makes clear, without section 7 the Act would be rendered meaningless. The right of employees to collective action is the Act's central protection, not a procedural provision designed to further ends defined

elsewhere. And with respect to the Act's purpose, this Court has described section 7 as a statute which "guarantees labor its 'fundamental right' to self-organization and collective bargaining." *Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am.* v. *Wis. Employ't Relations Bd.*, 315 U.S. 740, 750 (1942) (quoting *NLRB* v. *Jones & Laughlin Steel*, 301 U.S. 1, 33 (1937)). The NLRB in turn has held that the right to collective action granted by section 7 "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Horton I*, 357 N.L.R.B. at 2286. Because section 7 creates a core substantive right, the FAA does not mandate enforcement of a provision that violates it. See *CompuCredit*, 132 S. Ct. at 669-671; *Rodriquez*, 490 U.S. at 481.

AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, is not to the contrary. In that case, consumers asserted that an arbitration provision was unenforceable under a California state law that barred class-action waivers in most arbitration agreements. *Id.* at 337-340. This Court declined to read the FAA's saving clause as facilitating a state policy protecting low-value claims brought under other laws. Such a policy, it held, "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 340, 343; see also *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310, 2312 & n.5 (2013). Likewise, in *Italian Colors*, the Court rejected a judge-made rule rendering class arbitration waivers unenforceable when the plaintiff's cost of individually arbitrating a claim exceeded the potential recovery. *Italian Colors*, 133 S. Ct. at 2310-2312. Those holdings

do not suggest that the FAA requires enforcing a contractual provision that directly violates a federal statute such as the NLRA. *Concepcion* and *Italian Colors* analyzed whether judge-made or implicit state statutory policies were incompatible with the FAA, not whether an arbitration provision violated the substance of another federal law.

To suggest that the FAA requires the enforcement of illegal contracts leads to surprising conclusions. If that were true, all one would need to do to effectively enforce an illegal contract would be to include an arbitration provision. Taken to its logical conclusion, petitioner's view would have breathtaking implycations. Courts, for example, could not decline to enforce arbitration provisions that violate other federal statutes, such as agreements not to compete in violation of federal antitrust statutes. But see *Kaiser Steel Corp.*, 455 U.S. at 77-79 (holding that a court should not enforce a contract that is in violation of federal antitrust laws); *Kelly* v. *Kosuga*, 358 U.S. 516, 521 (1959) (noting that a contract in violation of the Sherman Act "could not be enforced by a court"). At the extreme, if a party were willing to expose itself to criminal liability, a court would presumably have to enforce arbitration of a contract to murder for hire, even though such a contract is most repugnant to public policy. See, *e.g.*, *Green* v. *Pro Football, Inc.*, 31 F. Supp. 3d 714, 728-729 (D. Md. 2014) (citing *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985)) (refusing to force arbitration because underlying dispute concerned provision "no more enforceable, even if lesser in degree, than a contract to kill, the universally illegal contract").

Nothing in this Court's jurisprudence requires the enforcement of an illegal contract simply because it contains an arbitration provision. And petitioner points to no case in which this Court has enforced an arbitration provision that violates a federal statute like the NLRA.

This Court's decision in *CompuCredit*, 132 S.Ct. 665, a choice-of-forum case which Epic relies heavily upon, see Pet. 14-18, does not help it. In that case, the Court characterized the issue as "whether claims under the [Credit Repair Organization Act (CROA)] can proceed in an arbitrable forum." 132 S.Ct. at 673. Here, the issue is not whether any particular forum, including arbitration, is appropriate, but rather whether a provision that illegally bars collective action in *any* forum can be enforced under the FAA. *CompuCredit* concerned, moreover, a completely different objection to arbitration: whether the CROA represents a "contrary congressional command," *id.* at 669-670, foreclosing arbitration. It nowhere discussed whether an illegal provision of a contract could be enforced under the FAA's saving clause.[4]

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[4] Petitioner's amici pile on with a farrago of additional arguments. The National Association of Manufacturers (NAM), for example, contends that review is imperative because the NLRA's venue provision, 29 U.S.C. § 160(f), allows parties to "receive contradictory decisions on the enforceability of the *same* agreement," NAM Amicus Br. 9, and because "the NLRB's definition of 'supervisors' * * * render[s] it difficult for employers to determine which employees may enter into an agreement with a class waiver," *id.* at 10 (emphasis omitted). The NLRA's venue provision, however, actually *protects* employers. So long as they "transact[ ] business," 29 U.S.C. § 160(f), in a circuit that enforces collective-action waivers, they can successfully overturn any

* * *

The court of appeals was correct to conclude that since the collective-action waiver violates the NLRA the FAA's saving clause bars its enforcement.

III. This Case Is A Poor Vehicle To Decide The Question Presented

This case is a poor vehicle for this Court to decide petitioner's question presented for two reasons. First, the Seventh Circuit never reached it. As petitioner itself describes it, "[t]he question presented * * * asks

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NLRB decision that they have engaged in an unfair labor practice by asking employees to agree to such a waiver—even when another circuit has refused to enforce that same waiver in a private lawsuit.

This employer-protecting venue provision also explains the NLRB's nonacquiescence policy, which petitioner's amicus Pacific Legal Foundation (PLF) complains of, PLF Amicus Br. 8-12. As noted above, the NLRA's venue provisions allow NLRB orders to be reviewed in several circuits. Consequently, NLRB "nonacquiescence" is justified "by the fact that the venue provisions make it difficult for any particular court of appeals to insist on exclusive superintendence over the particular agency order." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 682 (1989).

Similarly, employers have lived for ten years under the supervisory-status test clarified by the NLRB in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687 (2006). Although NAM complains about that test now, all the courts it cites as criticizing the NLRB's supervisory-status test actually criticized the test in place *before* 2006. See NAM Amicus Br. 11-12 (citing five cases criticizing pre-*Oakwood* test). A leading employment law treatise indicates, moreover, that "[m]ost employer representatives [have] *welcomed* the *Oakwood* decision as providing additional guidelines." 3 Littler Mendelson's The National Employer § 31.1.3(f) (3d ed. 2014) (emphasis added).

whether Section 7 of the NLRA * * * qualifies as a contrary congressional command sufficient to overcome the FAA's presumption that [collective-action waivers] should be enforced according to their terms."[5] Pet. 3. The Seventh Circuit decided a different question. It did not ask whether the NLRA represented a "contrary congressional command" overriding the FAA. To do so, it held, would "put[] the cart before the horse." Pet. App. 13a. It instead decided the case on straight-forward saving-clause grounds: "Because the [collective-action waiver] is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove." *Id.* at 15a; see also *id.* at 23a (similar). The Seventh Circuit held that it need not reach petitioner's contrary-congressional-command argument because "[i]n order for there to be a conflict between the NLRA * * * and the FAA, the FAA would have to mandate the enforcement of Epic's arbitration clause," which it did not. *Id.* at 13a-14a. The saving clause prevented that.

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[5] Epic's discussion of the saving clause shows how peripheral it is to its own question presented. The petition discusses the saving clause for only two pages in its merits section, see Pet. 18-20, and does so only to argue that the Seventh Circuit cannot be right because "there [would] never [be] any need to determine whether another federal statute qualifies as a *contrary congressional command*." *Id.* at 18-19 (emphasis added). It also makes the remarkable claim in passing that the FAA's saving clause does not recognize "illegality-based defenses [that] arise[] only in *some* contracts, not '*any* contract.'" *Id.* at 20 (quoting 9 U.S.C. § 2). But even petitioner agrees that the FAA's saving clause recognizes "classic universal defenses such as fraud and mistake," *ibid.*, which apply only to "*some* contracts," namely only to those involving fraud and mistake.

Id. at 15a. Because the FAA itself forecloses enforcing an illegal contract provision, "there is no conflict between the NLRA and the FAA, let alone an irreconcilable one," *id.* at 14a, which requires a "contrary congressional command" before the NLRA can trump, *id.* at 13a-15a.[6]

Second, the case is a poor vehicle to decide petitioner's or even respondent's question presented because the collective-action waiver itself contains a "savings clause," which is dispositive and avoids the need for any analysis under the FAA. This clause states that "[i]f the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the *exclusive forum* for such claims." Pet. App. at 25a, 35a (emphasis added). Under the plain language of the contract, if a court determines that the collection-action waiver is illegal (and therefore unenforceable) because it violates a federal statute or for any other reason, no more

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[6] For these reasons, the suggestion by petitioner's amicus Chamber of Commerce of the United States (Chamber) that certiorari is necessary in this case in order to "put before the Court all of the issues that must be resolved," Chamber Amicus Br. 23, is puzzling indeed. This case does not present the straightforward "'contrary congressional command' issue" that the Chamber believes this Court needs to consider, *ibid.*, and although it does present "the right-to-pursue-statutory-remedies issue," *ibid.*, so too does the petition in *NLRB* v. *Murphy Oil USA, Inc.*, 16-307 Gov't Pet. 10-19, a vehicle posing none of the problems this case does.

analysis is necessary. The contract itself proscribes arbitration in this case.

Both the Seventh Circuit and the district court rested their decisions primarily on the *contractual* "savings clause," which is unique to this particular case. The Seventh Circuit stated, in fact, that "[s]ince we have concluded * * * that the collective-action waiver is incompatible with the NLRA, we could probably stop here: *the contract itself* demands that Lewis's claim be brought in a court." Pet. App. 12a (emphasis added). It went on to discuss the FAA only because "Epic * * * contends that we should ignore the contract's savings clause because the FAA trumps the NLRA. In essence, Epic says that even if the NLRA killed off the collective-action waiver, the FAA resuscitates it, and along with it, the rest of the arbitration apparatus." *Ibid.* In other words, the Seventh Circuit considered the FAA's saving clause only because Epic claimed that the FAA somehow overrode the contract's own savings provision—a position the court rejected. *Ibid.*

The district court likewise rested its holding on the contract's savings clause rather than the FAA's analog. It stated that because "the arbitration agreement includes [its own] 'savings clause[,]' * * * if [the court] conclude[s] that the [collective-action] waiver is invalid, [Lewis's] challenge to the rest of the arbitration agreement is moot." Pet. App. at 25a. It

was the agreement itself, not the FAA, that resolved the dispute.[7]

If this Court believes that the saving-clause question is now worthy of review, it should grant certiorari in *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9. 2016). For starters, all cases deciding the saving-clause issue rely on the NLRB's decision in *Horton I*, 357 N.L.R.B. 2277 (2012), the reasoning of which *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), recapitulates. In this case, for example, respondent relied heavily on *Horton I* in opposing Epic's motion to compel arbitration. And the court of appeals did the same, citing the NLRB's decisions numerous times and concluding that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it" under *Chevron*. Pet. App. 7a. Because the NLRB is a full party in *Murphy Oil* and that case fully considered the saving-clause issue, that case would be the most appropriate vehicle for this Court to review the question, if it wishes.

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[7] The contract's own savings clause is, moreover, *broader* than its statutory analog. Whereas the FAA's saving clause forecloses enforcement "upon such grounds as exist at law or in equity for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), the contract's own savings clause requires that "[i]f the [collective-action] waiver is found to be *unenforceable*, then any claim brought on a * * * collective * * * basis must be filed in a court of competent jurisdiction." Pet. App. 25a, 35a (emphasis added). By its own terms, the contract's savings clause bars arbitration if the collective-action waiver is unenforceable, not just revocable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL R. ORTIZ
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

DAVID C. ZOELLER
Counsel of Record
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street, Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

NOVEMBER 2016

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Supreme Court, U.S.
FILED
NOV 29 2016
OFFICE OF THE CLERK

No. 16-285

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
131 South Dearborn Street
Chicago, IL 60603

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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IN THE

Supreme Court of the United States

No. 16-285

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

It is undisputed that the federal courts of appeals are divided over an important question affecting millions of employers and employees nationwide: whether an agreement to submit workplace disputes to individual arbitration—and waive class and collective proceedings—is enforceable under the FAA, notwithstanding the NLRA. Lewis agrees that there is a split and quarrels with Epic only about how many federal and state courts are in the divide. That dispute at the margins detracts nothing from the compelling need for this Court to reconcile the lower courts' conflict.

This petition is the ideal vehicle for the Court to do so. It is unique among the pending petitions not only

because it seeks review of the decision that created the circuit split, but also because it seeks review of a fully reasoned opinion that is uncluttered by other issues. Unlike other courts of appeals, the Seventh Circuit below identified, considered, and decided *only* the disputed question. And, unlike the NLRB (and its petition filed by the Solicitor General), the private parties in this case have fixed positions on the question presented that are not dependent on the views of a new Administration. Accordingly, the Court should grant this petition.

ARGUMENT

I. REVIEW IS ESSENTIAL BECAUSE THERE IS A CLEAR SPLIT OF AUTHORITY ON THE QUESTION PRESENTED.

The parties are in agreement about the existence of a circuit split. To quote Lewis: "Petitioner is correct that the Seventh and Ninth Circuits disagree with the Fifth." Br. in Opp. 14. That concession alone suffices to justify this Court's review, *see* Sup. Ct. R. 10(a)—particularly when added to the chorus of courts that have acknowledged the split. *See, e.g.*, Pet. App. 15a n.† (observing that the decision below "create[s] a conflict in the circuits"); *Riederer* v. *United Healthcare Servs., Inc.*, No. 16-3041, 2016 WL 6682104, at *1 (7th Cir. Nov. 14, 2016) (unpublished order) (describing the "entrenched conflict among the circuits" and "the need" for "the Supreme Court * * * to resolve the conflict"); *Patterson* v. *Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (unpublished summary order) (noting that "[t]he circuit courts * * * are irreconcilably split," with the Second, Fifth, and Eighth Circuits on one side, and the Seventh and

Ninth Circuits on the other), *petition for cert. pending*, No. 16-388 (filed Sept. 22, 2016); *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016) ("recogniz[ing] that our sister Circuits are divided on this question"), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 480 (10th ed. 2013) ("If the lower courts have expressly acknowledged the conflict, * * * [t]his is the best 'evidence' of a genuine conflict.").

Lewis nevertheless insists that review is unwarranted because the split is shallow and likely to resolve itself. Br. in Opp. 9-17. Lewis's argument is flawed three times over.

First, even assuming that Lewis's erroneous reading of the divide in authorities were correct, his argument that a two-to-one circuit split is "shallow" is no reason to deny review. On many occasions this Court has granted review on the basis of a one-to-one circuit split. *See* Shapiro, *supra*, at 242. And it has not hesitated to grant review where, as here, the question presented is an important and recurring one in the area of employer-employee relations, where uniformity and predictability are essential to a harmonious workforce. *See, e.g.*, *Integrity Staffing Sols., Inc.* v. *Busk*, 135 S. Ct. 513, 516 (2014) (two-to-one circuit split); *Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 657 (2006) (two-to-one); *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 364 (2002) (one-to-one). Indeed, entities from every side of the dispute have petitioned the Court to decide the question, which is affirmative proof of the compelling need for review. *See* Pet. (employer); *Ernst & Young LLP* v. *Morris*, No. 16-300

(employer); *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (NLRB); *Patterson* v. *Raymours Furniture Co.*, No. 16-388 (employees). And these petitions collectively are supported by 13 different amici—ranging from Public Citizen to the U.S. Chamber of Commerce—all urging this Court to resolve the conflict.

Second, Lewis's assessment of the divide in authorities is inaccurate. The courts are split five-to-two over the question presented. *See* Pet. 7-13. Lewis nevertheless contends that four of the courts on the long side of the divide (the Second and Eighth Circuits, and the California and Nevada Supreme Courts) are not properly included in the count because they answered a different question, *see* Br. in Opp. 9-17—namely, whether the NLRA "qualifies as a contrary congressional command sufficient to overcome the FAA's presumption" that arbitration agreements should be enforced according to their terms, *id.* at 8 (quoting Pet. 3). According to Lewis, that is different from the question decided by the three courts of appeals in the circuit split: whether class waivers are "illegal" under the NLRA and, "if so, whether the FAA's saving clause nonetheless requires their enforcement." *Id.* at 9. In Lewis's telling, the critical distinction is whether a decision "rested * * * on congressional-command" arguments, or instead on "saving-clause arguments." *Id.* at 16; *accord id.* at 33.

Lewis is right that this distinction is critical, but wrong about the reason. All of the cases involve the very same underlying question: whether class waivers in employment-related arbitration agreements are enforceable under the FAA, notwithstanding the NLRA. Pet. i. That different courts have taken

different approaches to answer that question—some emphasizing the saving clause, others asking whether there is a contrary congressional command—is, in part, why there is a split. The courts disagree on how to go about interpreting both the FAA and the NLRA—and their divergent pathways have led to irreconcilable results: Five appellate courts will enforce class waivers in an employment arbitration agreement, and two will not. Pet. 7-13. That inconsistency *is* the conflict. *See* Shapiro, *supra*, at 242 ("A genuine conflict * * * arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Third and finally, the split is unlikely to resolve itself. Parties on all sides of the dispute have recognized as much. *See Murphy Oil* Pet. 22 (No. 16-307) (NLRB) ("There is accordingly little reason to expect the Seventh Circuit's express disagreement with the Fifth Circuit to be resolved without this Court's intervention."); *Patterson* Pet. 28 (No. 16-388) (employees) ("Further delay in resolving this issue will only lead to greater uncertainty. * * * [I]t is critical that this issue be resolved this Term."); Pet. 13 (employer) ("As more courts take a side in this dispute, the split becomes less likely to resolve itself.").

Lewis speculates that courts on the long side of the divide might change their minds now that the Seventh and Ninth Circuits have weighed in. *See* Br. in Opp. 13-17. But that is demonstrably not so. *After* the decision below (issued May 2016), the Second, Fifth, and Eighth Circuits reaffirmed their contrary rulings. *See Employers Res.* v. *NLRB*, No. 16-60034, 2016 WL 6471215, at *1 & n.1 (5th Cir. Nov. 1, 2016)

(per curiam); *Patterson*, 2016 WL 4598542, at *2 (2d Cir.) (issued Sept. 2016); *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (issued June 2016). This strongly suggests that there will be no reconciliation absent this Court's intervention.

Lewis also suggests that further percolation on the question presented is warranted. He is wrong. The divide in authority is intractable, creates a patchwork of inconsistency across the nation over the enforceability of employer-employee arbitration agreements, and leaves employers and employees alike in untenable uncertainty over how their workplace disputes will be resolved. *See, e.g.*, Int'l Ass'n of Def. Counsel Amicus Br. 12 (explaining that "employers across the country *** cannot know whether the lawfulness of their arbitration agreements will be assessed in a jurisdiction that is faithful, or hostile, to such agreements"); Nat'l Ass'n of Mfrs. Amici Br. 3 ("emphasiz[ing] the importance of the issue to employers throughout the country, especially because amici curiae have numerous members with business operations in multiple circuits, and whose arbitration agreements are now enforceable in some jurisdictions but not others"); U.S. Chamber of Commerce Amicus Br. 2 (noting the "broad national importance" of the issue, which affects "employment contracts involving millions of employees"). This uncertainty will not stand for further delay.

Nor would further percolation be helpful for this Court's analysis, in any event. The disputed question presents a pure and straightforward issue of statutory interpretation that has already been vetted

by multiple courts that have fully analyzed both sides of the issue. The time for review is now.

II. LEWIS'S MERITS ARGUMENTS FURTHER PROVE THE EXISTENCE OF AN IRRECONCILABLE CIRCUIT SPLIT.

The bulk of Lewis's brief in opposition is devoted to a merits analysis—either directly (at 18-30) or in the guise of a partial refutation of the divide in authorities (at 9-15), as discussed above. But Lewis's disagreement with Epic's discussion of Court precedent mirrors the disagreement among the lower courts over the meaning of this Court's cases—and reinforces the need for this Court's intervention.

Like the Seventh and Ninth Circuits, Lewis begins with the NLRA and asks whether it *could* be interpreted to protect employees' right to pursue class or collective actions. *See* Br. in Opp. 18-23; Pet. App. 3a-9a; *Morris*, 834 F.3d at 980-984. And like those circuits, he answers that question yes and then invokes the FAA, only to dismiss its relevance because the FAA's saving clause purportedly neutralizes any potential conflict with the NLRA. *See* Br. in Opp. 23-29; Pet. App. 12a-15a; *Morris*, 834 F.3d at 984-990. Epic, on the other hand—consistently with the Second, Fifth, and Eighth Circuits, and the California and Nevada Supreme Courts—starts where this Court has said to start, with the FAA. *See* Pet. 14-15; *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 358 (5th Cir. 2013); *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 295-296, 297 n.8 (2d Cir. 2013); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. 2013); *Tallman* v. *Eighth Jud. Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 140-142 (Cal.

2014). *CompuCredit*'s "contrary congressional command" test, rather than a saving-clause analysis, is the proper standard to apply in cases like this because it determines whether another federal statute (here, the NLRA) abrogates the FAA's mandate that arbitration agreements are to be enforced as written. Pet. 14-20; *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms[,] *** even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." (quotation marks omitted)).

Also like the Seventh and Ninth Circuits, Lewis unsuccessfully tries to distinguish away this Court's most recent cases emphasizing the primacy of federal policy favoring arbitration: *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), and *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). *See* Br. in Opp. 28 (arguing that *Italian Colors* and *Concepcion* do not control here because they "analyzed whether judge-made or implicit state statutory policies were incompatible with the FAA"); Pet. App. 15a (describing language from those cases as "dicta"); *Morris*, 834 F.3d at 988 (purporting to distinguish *Italian Colors* and *Concepcion* as cases where the enforcement defenses reflected a rejection of "the adequacy of arbitration proceedings"). Epic, following the majority of the courts to have considered the issue, has explained that *Italian Colors* and *Concepcion* show exactly why Lewis, the NLRB, the Seventh Circuit, and the Ninth Circuit are wrong. *See* Pet. 18-20; *Horton*, 737 F.3d at 358-360; *Owen*, 702 F.3d at 1054; *Sutherland*, 726 F.3d at 297; *Tallman*, 359 P.3d at 123; *Iskanian*, 327 P.3d at 141-

142. *Italian Colors* holds that "courts must rigorously enforce arbitration agreements according to their terms," even "for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command." 133 S. Ct. at 2309 (quotation marks omitted). And *Concepcion* holds that a contractual defense that renders an agreement unenforceable *because* it requires individual arbitration is a defense that "interferes with fundamental attributes of arbitration" in a manner that is "inconsistent with the FAA"—and therefore falls outside the saving clause. 563 U.S. at 344. The Seventh Circuit's failure to follow these fundamental principles is yet another reason why this Court should grant review.

III. THIS CASE IS THE IDEAL VEHICLE TO DECIDE THE QUESTION PRESENTED.

This case is the right vehicle to decide the question presented. Lewis concedes that his lawsuit falls within the parties' agreement to waive class or collective proceedings and individually arbitrate workplace disputes. Pet. App. 24a. This leaves only the purely legal question presented in dispute: whether class waivers in employment arbitration agreements are enforceable.

1. Lewis responds with two arguments, neither of which has merit. He first contends that the court of appeals below did not decide the question presented. Br. in Opp. 30-32. That argument is easily refuted by the face of the petition and the decision below. The petition asks this Court to decide whether an employer-employee agreement to submit workplace disputes to individual arbitration, and waive class and collective proceedings, is enforceable under the

FAA, notwithstanding the NLRA. Pet. i. The Seventh Circuit answered that question no. Pet. App. 1a-2a, 23a.

Tellingly, in making this argument, Lewis never once quotes, cites, or references the actual question presented by the petition. His remade version of the question is cobbled together from different sentences describing what the proper analysis *should* be on the merits of the question presented. *See* Br. in Opp. 10, 30-31 (quoting Pet. 3). This is a repackaging of the same misguided argument as before—that courts supposedly decided different questions when they apply different legal standards. *See supra* pp. 4-5. Lewis's first argument against review on purported vehicle grounds can be readily dismissed.

Lewis's second vehicle-related argument—that the arbitration agreement in dispute offers an alternative basis for the decision below, Br. in Opp. 32-34—is no more compelling than the first. His argument is based on the "savings clause" in Epic's arbitration agreement, which requires the parties to litigate their dispute in court if the class waiver in the agreement is unenforceable. *See* Pet. App. 35a. The question presented, of course, precedes that inquiry by asking whether the class waiver is enforceable in the first place. The arbitration agreement's savings clause thus does not come into play unless and until the question presented is answered in the negative. It is no impediment to review.

2. Of the four pending certiorari petitions asking the Court to reconcile the FAA and the NLRA, the employer petitions—and this one in particular—offer the best vehicles for Court review.

This petition is a better vehicle than *Patterson* for review because, unlike *Patterson*'s short summary order, the decision below offers a fully reasoned opinion that thoroughly aired the issue in a precedential decision. *Compare* Pet. App. 1a-23a, *with Patterson*, 2016 WL 4598542, at *1-3. Plus, the employees' petition in *Patterson* first and foremost asks the Court to grant review of *Murphy Oil*. *See Patterson* Pet. 9, 29 (No. 16-388).

Murphy Oil, however, is a poor vehicle for review. The petitioner in *Murphy Oil* is the NLRB, whose position on the merits could change with the new Administration. *See generally* Nat'l Ass'n of Mfrs. Amici Br. 13-14 n.17 (explaining the NLRB's history of adopting new positions with new administrations). This case, by contrast, involves private parties on both sides of the question. Their positions are not dependent on the views of the new Administration. Also, the decision below is uncluttered by the additional issues decided by the court of appeals in *Murphy Oil*. *Compare* Pet. App. 1a-23a, *with Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1017-1020 (5th Cir. 2015), *petition for cert. pending*, No. 16-307 (filed Sept. 9, 2016).[1]

That leaves this petition and *Morris*, both of which offer adequate vehicles to decide the question presented. Of the two, the present petition is the better

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[1] None of the decisions in the split of authority is contingent upon deference to the NLRB. The courts instead have interpreted the statutory language of the FAA and the NLRA directly, and reached conflicting interpretations. So although the NLRB's position on the question presented may change next year, the urgent need for this Court's review will not.

vehicle because the decision below identified, considered, and ruled on only the question presented. *Compare* Pet. App. 1a-23a, *with Morris*, 834 F.3d at 990 ("because the contract's conflict with the NLRA is determinative, we need not—and do not—reach plaintiff's alternative arguments"). And unlike in *Morris*, the arbitration agreement at issue here requires the parties to go straight to arbitration. Pet. App. 30a-35a. The agreement in *Morris*, by contrast, requires mediation as a mandatory first step—raising a distinct question of the legality of that separate channeling requirement. Ex. C to Mot. to Dismiss, No. 4:12-cv-4964-JSW (N.D. Cal. Jan. 11, 2013), ECF No. 42-4. Nevertheless, the Court may wish to grant both employer petitions and order that the cases be heard in tandem—allowing a full presentation on this very important issue and giving the government the opportunity for additional briefing.

* * *

In short, this petition was the first of those now pending on the question presented to be filed. It is not derivative of any other. The decision below contains a fully developed analysis of the legal issue. And it is unencumbered by the potentially superseding issues existing in other cases. The Court therefore should grant this petition, resolve the split of authority, and decide this undisputedly important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
131 South Dearborn Street
Chicago, IL 60603

NEAL KUMAR KATYAL
Counsel of Record
MARY HELEN WIMBERLY
FREDERICK LIU
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

NOVEMBER 2016

Counsel for Petitioner

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT - 3 2016
OFFICE OF THE CLERK

No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN
Counsel of Record
ATLANTIC LEGAL FOUNDATION
2039 PALMER AVENUE, #104
LARCHMONT, NY 10538
(914) 834-3322
mskaufman@atlanticlegal.org
ATTORNEYS FOR
ATLANTIC LEGAL FOUNDATION

October 2016

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer

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[1] Pursuant to Rule 37.2(a), *amicus* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. All parties have consented to the filing of this brief.; the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The abiding interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in numerous cases before this Court, involving arbitration issues, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and *DIRECTV, INC. v. Imburgia*, 136 S. Ct. 463 (2015).

There is a clear, acknowledged, and undisputed circuit split The federal courts of appeals are divided as to whether the National Labor Relations Act, 29 U.S.C. *et seq.* (NLRA) overrides the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA")'s presumption that arbitration agreements are enforceable as written. The two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

Amicus also believes that the decision of the Court of Appeals for the Seventh Circuit in this case is inconsistent with the purposes of the FAA

and both the long-standing and recent teaching of this Court regarding arbitration, and is in direct conflict with decisions of at least three other Circuits.

The decision below, if allowed to stand, will deter many employers from incorporating arbitration as a dispute resolution mechanism in their dealings with employees, thus frustrating a fundamental purpose of the FAA.

PRELIMINARY STATEMENT

The Supreme Court is being asked to resolve a clear circuit split arising from contrary conclusions drawn recently by several circuits about whether class and collective action waivers in employment arbitration agreements violate the National Labor Relations Act, and whether the NLRA overrides the Federal Arbitration Act in three petitions for certiorari filed in September 2016, namely the instant case as well as *Ernst & Young, LLP v. Morris*, No. 16-300, (filed Sept. 8, 2016) and *NLRB v. Murphy Oil*, No. 16-307 (filed Sept. 9, 2016). The fact that three petitions have been filed with the Court in such a two week period, involving very similar legal and factual issues, and that petitions have been filed by both employers and the NLRB, indicates the importance of the issues and the importance of the Court determining the scope of employers' and employees' rights under the two federal statutory schemes at issue as applied to arbitration agreements that contain a waiver of

the right to engage in class litigation or class arbitration.

The FAA establishes a presumption in favor of enforcing arbitration agreements as written that can be overcome by another statute, but only if that statute is a "congressional command" that is contrary to the FAA's mandate.

The Ninth Circuit in *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016), and Seventh Circuit in this case held that the NLRA is a "congressional command" that creates an exception to the FAA's promotion of arbitration as a preferred means of dispute resolution. The Fifth Circuit, in *Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) held that the NLRA is not an unambiguous "congressional command," and that it did not fall within the FAA's "saving clause" of "illegality."

Petitioners in all three cases – employers and the NLRB (charged with protecting the interests of employees) – argue in strikingly similar language that the issue whether an employer can lawfully require its employees to sign agreements mandating individual arbitration of workplace disputes "is an important and recurring question" about the federal policy encouraging arbitration embodied in the Federal Arbitration Act and the scope of employees' rights under the NLRA. See NLRB Petition in No. 16-307 at 9; see also Ernst

& Young Petition in No. 16-330 at 10 and Epic Petition in this case at 4.

The employer petitioners in the cases arising from the decisions of the Seventh and Ninth Circuits – the case at bar and *Ernst & Young v. Morris*, No. 16-330 – diverge from the NLRB primarily in their respective positions on the substantive issue in each case.

The outcome of these cases has far-reaching implications for employers and employees across the United States. If the Seventh and Ninth Circuits' rule stands, employers doing business in those circuits will be subject to a different legal regime than employers with employees in the Second, Fifth, and Eighth Circuits, and even employers in those circuits face the real threat of enforcement action by the NLRB before administrative tribunals until the Supreme Court establishes a uniform nationwide rule.

BACKGROUND

Epic Systems is a Wisconsin-based developer of computer software for recording, organizing, storing and sharing healthcare data. Epic employees develop, install, and maintain the software.

In April 2014, Epic sent an email containing an arbitration agreement to many of its employees. The email asked recipients to confirm that they understood and consented to the agreement, or

they could request that someone contact them about it. Pet. App. 2a.

Lewis, a technical writer at Epic, acknowledged the arbitration agreement and continued to work at Epic. The agreement provided that by continuing to work at Epic, Lewis was deemed to have accepted its terms. In the agreement, Lewis waived his "right to participate in or receive money or any other relief from any class, collective, or representative proceeding."

Lewis left Epic's employ and later filed suit in federal court in Wisconsin on behalf of himself and other technical writers alleging the company had violated the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA), by misclassifying them and depriving them of overtime pay.

Epic moved to dismiss Lewis's claim and compel individual arbitration. Lewis responded that the agreement's class and collective action waiver was unenforceable because it interfered with his right to engage in concerted activities under Section 7 of the NLRA. The district court agreed with Lewis's arguments and Epic appealed to the Seventh Circuit. Epic appealed, and the Seventh Circuit affirmed.

The Seventh Circuit's Decision

The Seventh Circuit Court of Appeals concluded that "[a] collective, representative, or class legal proceeding is * * * a 'concerted activit[y]'" under NLRA Section 7. Pet. App. 10a (brackets in original), and Section 8 of the NLRA prohibits an

employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1). Thus, the court held, the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

The Seventh Circuit began its analysis by adopting the NLRB's reasoning – promulgated in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) – that engaging in class, collective or representative proceedings is "concerted activity" and a protected right under Section 7 of the NLRA, and thus it would be an unfair labor practice under Section 8 of the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise" of this right. According to the court, the NLRA's legislative history and purpose indicated that "concerted activity" unambiguously includes representative, class, joint and collective actions. Further, even if the court were to find the term "concerted activity" ambiguous, it would then have to defer to the NLRB's interpretation of that term and find the class action waiver to be unlawful.

The Seventh Circuit rejected Epic's three principal arguments. First, Epic argued that because class actions under Rule 23 of the Federal Rules of Civil Procedure did not exist when Congress enacted the NLRA in 1935, Congress could not have intended Rule 23 class actions to be "concerted activity" under the NLRA. The court, however, held that "concerted activity" is not limited to what was "concerted activity" in 1935. Also, the arbitration agreement not only waived

Rule 23 class actions, it waived all forms of representative, collective or joint proceedings, and these types of proceedings, including collective actions under §216(b) of the FLSA, existed prior to 1935.

Second, the Seventh Circuit rejected the argument, accepted by all the other circuits that had theretofore ruled on the matter, that the arbitration agreement must be enforced under the Federal Arbitration Act (FAA). The court even went so far as to say that "it is not clear to us that the FAA has anything to do with this case." Nevertheless, the court proceeded to examine whether there was a conflict between the FAA's mandate to place arbitration agreements on the same footing as any other contract and the NLRA. In doing so, the court addressed the FAA's "savings clause," contained in 9 U.S.C. § 2, which provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Pet.App. at 14a-15a (quoting 9 U.S.C. § 2) and "[i]llegality is one of those grounds." *Id.* at 15a. The court found the savings clause provided a way to harmonize the NLRA and FAA, by finding the agreement's class waiver to be unenforceable. According to the court, the agreement is illegal under the NLRA, and because an illegal agreement is not enforceable under the FAA's savings clause, there is no conflict between the FAA and NLRA. *Id.* at 20a.

Finally, Epic contended that even if Section 7 protects a right to class or collective actions, the right is merely procedural not substantive, and the FAA requires enforcement of the agreement since it does not involve the forfeiture of a substantive right. The court rejected this argument because it found the right to engage in "concerted activity" through class or collective actions is a substantive right under the NLRA, even though the class action device itself is procedural. Since the arbitration agreement required employees to relinquish a right that the NLRB has declared to be substantive, it was not enforceable under the FAA.

The Seventh Circuit acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), had come "to the opposite conclusion," Pet. App. 15a, and proceeded to "create a conflict in the circuits." *Id.* at 15a n.†.

SUMMARY OF ARGUMENT

The split of authority among several circuits in this case is clear, acknowledged, and undisputed. The federal courts of appeals are divided, three to two, on whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, requires that employment-related disputes be resolved by individual arbitration. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the

petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

Likewise, all three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court.

Review is also warranted because the decision below was incorrect. It ignores this Court's teaching that the FAA embodies "a liberal federal policy favoring arbitration agreements" and that arbitration agreements must be enforced according to their terms, that the foregoing principle applies even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command which must be expressed with "clarity."

ARGUMENT

I. THERE IS AN ACKNOWLEDGED AND INDISPUTABLE SPLIT OF AUTHORITY AMONG THE CIRCUITS ON THE QUESTION PRESENTED.

The split of authority in this case is clear, acknowledged, and undisputed. The federal courts of appeals are divided, three to two, on whether the NLRA overrides the FAA's presumption that arbitration agreements are enforceable as written, requires that employment-related disputes be

resolved by individual arbitration. Indeed, the two circuits that have held arbitration agreements in the labor-relations context are unenforceable acknowledge a clear circuit split and all of the petitioners in the three cases now pending before the Court that raise this issue – employers and the NLRB alike – agree that there is a serious and direct circuit split.

The Second, Fifth, and Eighth Circuits have held that arbitration agreements that incorporate waivers of class and collective arbitration and litigation in the employment context are enforceable under the FAA.

The Fifth Circuit has squarely and repeatedly upheld class waivers in employment-related arbitration agreements. In *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013), the court rejected a decision by the National Labor Relations Board (NLRB or Board), which had found the class waiver at issue unenforceable under the FAA and the NLRA. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Fifth Circuit considered and rejected the NLRB's decision that the FAA's saving clause was a basis for invalidating class waivers because of alleged " illegality" under the NLRA. 737 F.3d at 360. The NLRB's analysis was flawed, the Fifth Circuit explained, because its finding of illegality had "the effect of * * * disfavor[ing] arbitration." *Id.* at 359 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011)). The court therefore concluded that the defense falls outside the saving clause. *Id.*

The Fifth Circuit then analyzed the issue in the schema required by this Court's in cases in which a party seeks to avoid arbitration based on a purported conflict with another federal statute such as the NLRA. The court asked whether the NLRA is "'a contrary congressional command'" that overcomes the FAA's presumption in favor of arbitration. *Id.* (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The Fifth Circuit determined that "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* In so holding, the Fifth Circuit recognized that "[e]very one of our sister circuits to consider the issue" has "held arbitration agreements containing class waivers enforceable," and the court was "loath to create a circuit split." *Id.* at 362 and the proper result was that a class waiver "must be enforced according to its terms." *Id.*

The Fifth Circuit has adhered to this view consistently since its decision in *D.R. Horton*, in the face of serial challenges to its decisions from the NLRB, challenges that are brought when aggrieved parties elect to file petitions to review NLRB rulings in the Fifth Circuit. *See Citi Trends, Inc. v. NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016) (per curiam); and, most recently, in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013,

1021 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In *Murphy Oil*, the Fifth Circuit again addressed the legality of individual arbitration agreements under Sections 7 and 8(a) of the NLRA and once again upheld the legality of an arbitration agreement that contains a waiver of the right to commence or participate in class-wide arbitration or litigation. The Fifth Circuit considered a nearly identical case only two years earlier in *D.R. Horton*.

Murphy Oil's arbitration agreement included a waiver of the employee's right to pursue class and collective actions. The agreement provided that employees must individually "resolve any and all disputes or claims...which relate...to Individual's employment...by binding arbitration." Several employees filed a FLSA collective action and Murphy Oil sought dismissal of the suit and to compel arbitration. One of the plaintiff employees filed an unfair labor charge with the NLRB alleging that the agreement unlawfully interfered with employees' Section 7 rights guaranteed by the NLRA.

In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its *Murphy Oil* opinion, *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and chose instead to reaffirm its previous position that an arbitration agreement similar to Murphy Oil's violated the NLRA because the agreement

restricted Section 7 rights to engage in concerted activity. The NLRB applied its *D.R. Horton* decision, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), to Murphy Oil's arbitration agreement and similarly concluded that both the original and amended Murphy Oil arbitration agreements could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges, and thus required corrective action.[2] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014).

Before the NLRB issued its *Murphy Oil* ruling, the Fifth Circuit had overturned the NLRB's *D.R. Horton* decision. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013). Murphy Oil petitioned the Fifth Circuit to review the NLRB's decision that ignored the Court's *D.R. Horton* ruling. The Fifth Circuit held in *Murphy Oil* that the original arbitration agreement violated employees' Section 7 rights, but that the amended agreement was lawful. The court considered Murphy Oil's pre- and post-*D.R. Horton* agreements separately because the agreements had different language. The Fifth Circuit concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for "any and all disputes or claims...which relate...to Individual's employment" could be

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[2] After the Fifth Circuit's *D.R. Horton* decision Murphy Oil revised its agreement to include language clarifying that the agreement did not bar employees from "'participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

interpreted to mean that the employee could not file unfair labor practice charges with the NLRB, since "any and all" claims related to employment had to proceed to individual arbitration, could have a chilling effect on employees' ability to act collectively, and thus constituted an unfair labor practice.

But the Court found Murphy Oil's revised arbitration agreement did not violate the NLRA because an employee could not reasonably interpret the revised agreement to prohibit filing unfair labor practice charges, because the agreement clearly stated the opposite. The Fifth Circuit's *Murphy Oil* decision held that individual arbitration agreements are not a per se unfair labor practices and held further that "an express statement" preserving employees' right to file Board charges is not required. See NLRB Petition in *Murphy Oil*, No. 16-307, Pet.App. 11a.

The Eighth Circuit also has concluded that employment arbitration agreements containing class waivers are enforceable under the FAA, notwithstanding federal labor laws or the NLRB's interpretation of those laws. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013). In *Owen*, the Eighth Circuit acknowledged the NLRB's determination that class waivers in employment arbitration agreements are unenforceable, but explicitly "reject[ed]" the "invitation to follow the NLRB's rationale." 702 F.3d at 1055, and instead

found the FAA's presumption in favor of the enforcement of arbitration agreements to be dispositive. *See id.* at 1052-1055.

The Eighth Circuit followed this Court's teaching that "there must be a 'contrary congressional command' for another statute to override the FAA's mandate." *Id.* at 1052 (quoting *CompuCredit*, 132 S. Ct. at 669), and found that the two potential contrary congressional commands alleged in *Owen* – the FLSA and the NLRA – did not constitute such a "contrary congressional command." *Id.* at 1053-1054. The Eighth Circuit concluded that neither statute sufficed to "override[] the mandate of the FAA in favor of arbitration." *Id.* at 1055. Because Congress had reenacted the FAA in 1947, *after* passing both of the labor statutes, the court reasoned, "Congress intended its arbitration protections to remain intact even in light of the earlier passage of * * * major labor relations statutes." *Id.* at 1053.

The Eighth Circuit reaffirmed its *Owen* decision recently in *Cellular Sales*, 824 F.3d 772. That case came before the court of appeals on a petition to review the NLRB's ruling "'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA." *Id.* at 776. The court granted the petition in relevant part, explaining that the "holding in *Owen* is fatal" to the NLRB's position because following *Owen*, an "arbitration agreement that include[s] a waiver of class or collective actions in all forums to resolve employment-related disputes" is enforceable. *Id.*

The Second Circuit is in agreement with the Fifth and Eighth Circuits. *See Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam); it, too, held that a class waiver in an arbitration clause in the employment context is enforceable. Sutherland worked for Ernst & Young and agreed to resolve all disputes with Ernst & Young through individual arbitration. *Id.* at 293-294. After the plaintiff filed a class action in federal court, Ernst & Young moved to compel arbitration. *Id.* at 294. The district court denied the motion, but the Second Circuit reversed. *Id.* at 299. Like the Eighth Circuit in *Owen*, the Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 295 (internal quotation marks and citation omitted). The court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-297 & n.8. Like the Eighth Circuit, the Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* at 297 n.8. It held that an employment arbitration agreement is enforceable under the FAA. *Id.* at 292-293, 299 (citing *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).[3]

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[3] The Sixth and Eleventh circuits have also held that (continued...)

On the other side of the split are the Seventh and Ninth Circuits. The Seventh Circuit deviated from its sister circuits in the decision below. It expressly recognized that its opinion "would create a conflict in the circuits." Pet. App. 15a n †. Unlike the Second, Fifth, and Eighth Circuits, the Seventh Circuit held that agreements to submit employment disputes to individual arbitration are *not* enforceable under the NLRA and the FAA. The panel concluded that class waivers in employment arbitration agreements are "illegal" under the NLRA because they interfere with employees' right to engage in concerted activities. *Id.* at 10a-11a. It determined that such waivers are unenforceable under the FAA's saving clause because illegality is a "'ground[ ] * * * for the revocation of any contract.'" *Id.* at 14a-15a (quoting 9 U.S.C. § 2); *see id.* at 20a.

The Seventh Circuit acknowledged that the Fifth Circuit had reached "the opposite conclusion." *Id.* at 15a, but the Seventh Circuit minimized the Fifth Circuit's reasoning as relying on mere "dicta" from this Court's decisions in *Concepcion* and *Italian Colors*. *Id.* As for the Second and Eighth Circuits, the panel did not

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[3](...continued)
the FAA requires enforcement of class waivers in employment arbitration agreements, but without discussing the NLRA in their decisions. *See Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592 (6th Cir. 2014); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-1336 (11th Cir. 2014).

dispute that these "two circuits agree with the Fifth," citing *Sutherland* and *Owen*, but it viewed the analysis by those circuits as insufficient. *Id.* at 19a.

The Ninth Circuit has joined the Seventh. In *Morris* v. *Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), a divided panel held that a waiver provision requiring employees to bring legal claims through individual arbitration violates the NLRA and therefore is unenforceable. *Id.* at *1, *5. The Ninth Circuit majority concluded that the FAA's saving clause "caus[es] the FAA's enforcement mandate to yield" to the NLRA. *Id.* at *7.

The majority acknowledged that it was widening a circuit split. Although it "agree[d] with the Seventh Circuit," the majority "recognize[d] that sister Circuits are divided on this question." *Id.* at *10 n.16.

Judge Ikuta dissented. She described the majority's decision as "breathtaking in its scope and in its error." *Id.* at *11. In her view, the NLRA was not a contrary congressional command that overrode the FAA's enforcement mandate. *Id.* at *12-*14. Judge Ikuta stressed that the majority's decision was "directly contrary to Supreme Court precedent and join[ed] the wrong side of a circuit split." *Id.* at *11.

The split in the circuits promises only more turmoil and expensive, time-wasting litigation. It frustrates Congress's intent in passing the FAA "to move the parties to an arbitrable dispute out of

court and into arbitration as quickly and easily as possible" so as not to "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983).

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW.

All three petitions pending before the Court raising the issue presented in this case – from employers and the NLRB – argue that the circuit split is fully developed, acknowledged, and ripe for resolution by this Court. See Pet. at 20, Petition in *Ernst & Young v. Morris*, No. 16-300 at 19, and Petition in *NLRB v. Murphy Oil*, No. 16-307 at 24.

The competing decisions by several courts of appeal have examined and evaluated the arguments on both sides. The Second, Fifth and Eighth Circuits have upheld class and collective waivers under the FAA and the NLRA; the Seventh and Ninth Circuits have invalidated the waivers.

The split is unlikely to resolve itself. This Court should intervene now to resolve it.

III. THE SEVENTH CIRCUIT'S DECISION IS INCORRECT.

Review is also warranted because the decision below was incorrect.

As this Court has repeatedly stated, the FAA embodies "a liberal federal policy favoring

arbitration agreements." *Moses H. Cone Memorial Hospital*, 460 U.S. 1, 24 (1983). Consistent with that policy, the Court has repeatedly held that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") and has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 132 S. Ct. 665; *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson / American Express*, 482 U.S. 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Moses H. Cone*, 460 U.S. 1). arbitration agreements must be enforced according to their terms. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. 333, 339, 346.

The foregoing principle applies "even when the claims at issue are created by federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669 (citation and internal quotation marks omitted). The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer*, 500 U.S. 20, 26 (1991) and Congress' intent to supersede the FAA must be expressed with "clarity." *CompuCredit*, 132 S. Ct. at 672.

The Seventh Circuit did not evaluate whether the NLRA supplies the necessary "contrary congressional command" that overrides the FAA's overarching policy in favor of enforcing arbitration agreements according to their terms. The NLRA contains no congressional command contrary to collective-action waivers. The collective bargaining provisions of the NLRA do not mention arbitration and do not confer a specific right to take legal action at all, whether individually or collectively. Section 7 gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, but it contains no "command" that this Court has indicated would override the presumption that arbitration agreements should be enforced according to their terms. The NLRA does not contain the requisite "contrary congressional command," that overrides the parties' arbitration agreement according to its terms. *CompuCredit*, 132 S. Ct. at 669, 672.

In *CompuCredit*, the Court found that more direct statutory language lacked the kind of clear congressional command necessary to nullify an arbitration agreement. The Court found the language in the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, insufficient to override the FAA's policy. Plaintiffs in that case argued the CROA precluded enforcement of an arbitration agreement that contained a waiver of consumers' right to litigate in court, 132 S. Ct. at

669[4] and held that Congress did not intend to preclude arbitration of claims under CROA. See *id.* at 672-673. The Court remarked that if Congress had intended to bar arbitration of consumers' claims, "it would have done so in a manner less obtuse than what respondents suggest." *Id.* at 672, and it gave examples of congressional commands that would be sufficiently clear. *Id.*

Nothing in the language of the NLRA establishes congressional intent to override the FAA with the requisite clarity, and nothing in the legislative history of the NLRA suggests an intent to confer a right to file class or consolidated claims against employers or that overrides the FAA. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). Nothing in the NLRA suggests that employees' right to bargain collectively includes the right to resolve disputes using a particular legal procedure.

Moreover, there is no conflict between collective action waivers and the NLRA's underlying purposes. See *Gilmer*, 500 U.S. at 26. Indeed, "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." See *United*

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[4] Plaintiffs in *CompuCredit* cited language in the CROA that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could "not be enforced by any Federal or State court," 15 U.S.C. § 1679f(a). See 132 S. Ct. at 669.

Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

The Seventh Circuit's application of the FAA's saving clause is inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause. *Concepcion*, 563 U.S. at 341. This Court determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

Martin S. Kaufman
Counsel of Record
Atlantic Legal Foundation
2039 Palmer Avenue, #104
Larchmont, New York 10538
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for Amicus Curiae
Atlantic Legal Foundation

October 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 3 - 2016
OFFICE OF THE CLERK

Nos. 16-285 & 16-3[illegible]

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Seventh and Ninth Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

Library of Congress

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in these cases.[1]

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in both cases received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk, except respondents in No. 16-300, whose letter of consent has been filed concurrently with this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases—and two other pending petitions[2]—bring before the Court the determination by the National Labor Relations Board that agreements between employers and employees to arbitrate disputes on an individual basis constitute an unfair labor practice because, by precluding class actions, they interfere with "concerted activities" protected by Section 7 of the National Labor Relations Act ("NLRA"). *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, *enf. denied in relevant part sub nom. D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013).

The issue has caused an untenable split among the lower courts and is of broad national importance, implicating employment contracts involving millions of employees. It clearly merits this Court's review.

Rather than elaborating on the reasons why review is warranted—which are discussed in detail in the petitions—this brief focuses on the other important question the Court must resolve at the certiorari stage: which petitions the Court should grant.

To answer that question, it is first necessary to identify the multiple issues that the Court will be required to address in order to resolve conclusively whether the National Labor Relations Act overrides the Federal Arbitration Act's mandate that arbitration be enforced. Then, the Court must determine which questions presented encompass all of the relevant issues.

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[2] No. 16-307 (*NLRB* v. *Murphy Oil USA, Inc.*), and No. 16-388 (*Patterson* v. *Raymours Furniture Co.*).

In our view, that important consideration weighs heavily in favor of granting the petitions in these cases (Nos. 16-285 and 16-300), irrespective of whether the Court also grants the government's petition in No. 16-307 (*Murphy Oil*).[3]

The Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule:

- Whether the FAA's "mandate" that arbitration agreements be enforced is "overridden by a contrary congressional command" in the NLRA. *Shearson/Am. Express Inc.* v. *McMahon*, 482 U. S. 220, 226 (1987).
- Whether an arbitration agreement precluding class proceedings is invalid because it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310.
- Whether application of the *D.R. Horton* rule is permissible under the "savings clause" of Section 2 of the FAA, which allows arbitration agreements to be denied effect based on generally applicable "grounds * * * at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only

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[3] A fourth petition, in *Patterson* v. *Raymours Furniture Co.*, No. 16-388, also raises the issue discussed here. The petitioner in *Patterson* does not seek plenary review and instead requests that the Board's petition in No. 16-307 (*Murphy Oil*) be granted. See Pet. for Certiorari 9, 29, No. 16-388.

one of these issues—whether the *D.R. Horton* rule falls within the FAA's savings clause. That blinkered focus excludes critical issues that the Court will be required to address and, therefore, would not put before the Court the multiple legal issues it must decide to resolve the conflict definitively.

Therefore, regardless of whether the Court grants the government's petition, we urge the Court to grant the petitions in *Epic Systems* and *Ernst & Young*. Both petitions frame the question presented broadly and capture all of the relevant inquiries.

In recent Terms, the Court has granted multiple petitions in the Fourth Amendment blood alcohol cases (see *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016)), the Affordable Care Act/Religious Freedom Restoration Act cases (see *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam)), and the Fourth Amendment cell phone cases (see *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014)) to ensure a full presentation of the issues. It should cast a broad net here as well.

ARGUMENT

I. THIS COURT MUST ADDRESS THREE DISTINCT ISSUES TO FULLY RESOLVE THE CONFLICT AMONG THE LOWER COURTS.

The issue presented by these petitions is important, frequently recurring, and the subject of a deep and intolerable split among the federal courts of appeals and state courts of last resort. This Court's review is manifestly warranted.

This dispute, at bottom, requires the Court to reconcile two federal statutes, a function that the

Court is often called upon to perform in a variety of contexts. When faced with the task of reconciling other federal laws with the FAA, the Court has distilled its general approach into two well-developed legal tests.

First, the Court asks whether the other federal statute contains a "contrary congressional command" overriding the FAA.

Second, the Court assesses whether an arbitration agreement "operat[es] as a prospective waiver of a party's right to pursue statutory remedies" created by the other federal law.

The Board relies principally on a third ground to justify its *D.R. Horton* rule, arguing that the rule falls within the FAA's "savings clause."

The Court must address each of these issues to resolve conclusively the dispute presented by the pending petitions. These issues in turn raise a number of subsidiary questions. (In the Chamber's view, none of these inquiries justifies the Board's *D.R. Horton* rule.)

A. The Two Statutes.

As the petitions explain, these cases involve the interaction of two federal statutes: the Federal Arbitration Act ("FAA") and the National Labor Relations Act ("NLRA").

The FAA. Enacted in 1925, the FAA was intended to "reverse the longstanding judicial hostility to arbitration agreements," *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002), and substitute "an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp.* v.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985)).

The statute mandates the enforceability of arbitration agreements, providing that they are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In the absence of such generally applicable grounds, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (quotation marks, brackets, and citations omitted).

This Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted); see also *Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers); *Concepcion*, 563 U.S. at 340, 352.

The arbitration agreements in the cases currently before the Court all require disputes to be arbitrated on an individual basis, and prohibit class proceedings.

The National Labor Relations Act. Section 7 of the NLRA, which was enacted in 1935, protects the right of covered employees to organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8, in turn, makes it unlawful for employers to "interfere

with, restrain, or coerce employees in the exercise of" these rights. *Id.* § 158(a)(1).

In the Board's view, an employee's participation in a class or collective lawsuits is a form of "concerted activit[y]" under Section 7, and agreements to arbitrate disputes on an individual basis infringe upon that right in violation of Section 8.

B. The Legal Issues.

1. Does The NLRA Contain A "Contrary Congressional Command" Overriding The FAA?

Background. When plaintiffs argue that another federal statute provides grounds for invalidating an arbitration agreement, this Court has asked whether the other federal statute contains a "contrary congressional command' overriding the FAA's mandate that arbitration agreements be enforced. *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 669 (2012). This Court has been loath to find that test satisfied, holding that if a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 673.

The Court outlined the "contrary congressional command" test almost thirty years ago in *McMahon*, 482 U.S. at 226. "[I]n every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement," this Court "begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." Pet. App. 29a, No. 16-300 (Ikuta, J., dissenting); see *CompuCredit*, 132 S. Ct. at 669; *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas* v. *Shearson/Am. Ex-*

press, Inc., 490 U.S. 477 (1989); *Mitsubishi Motors*, 473 U.S. at 640.

Under this test, "[t]he burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227.

The Court has explained, moreover, that when Congress wants to override the FAA in a particular context, it does so with "clarity" by mentioning arbitration expressly in the text of the statute. *CompuCredit*, 132 S. Ct. at 672 (citing 7 U.S.C. § 26(n)(2); 12 U.S.C. § 5518(b); and 15 U.S.C. § 1226(a)(2)).

The "contrary congressional command" standard is a demanding one. Indeed, each time this Court has applied the test, it has concluded that the federal statute at issue did not evince the requisite "contrary congressional command." See *CompuCredit*, 132 S. Ct. at 673 (Credit Repair Organizations Act); *Gilmer*, 500 U.S. at 35 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 484 (Securities Act of 1933); *McMahon*, 482 U.S. at 238, 242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 640 (Sherman Act).

To prevail under this framework, the respondents in *Epic* and *Ernst & Young*, and the Board in *Murphy Oil*, would have to establish that the NLRA contains clearer language precluding individual arbitration than the statutes found insufficient in the preceding cases. That is a tall order.

Analysis. The text of the NLRA does not mention arbitration. That fact alone is dispositive of the issue.

As this Court explained in *CompuCredit*, when a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." 132 S. Ct. at 673. See also *D.R. Horton* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (noting that Congress "did not discuss the right to file class or consolidated claims against employers" in the NLRA); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014) (Liu, J.) ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

The Board, in its *Murphy Oil* decision, asserted that Section 7 of the NLRA overrides the FAA by providing a right to engage in "concerted activities." Pet. App. 45a-46a, No. 16-307 . But that general phrase does not clearly refer to litigation, let alone negate the FAA's protection of individual arbitration. And as the dissents from the NLRB's *Murphy Oil* decision explain, there are compelling arguments that the NLRA unambiguously precludes the *D.R. Horton* rule. Pet. App. 89a-208a, No. 16-307 . At a minimum, the statutory text is ambiguous regarding the permissibility of the rule.

Even if Section 7 could be read, on balance, to protect access to class- or collective-action mechanisms, that would not be sufficient to override the FAA. The Credit Repair Organizations Act ("CROA") expressly allows plaintiffs to bring actions in court, expressly specifies standards governing class actions, and prohibits the waiver of "any right * * * under this sub-chapter," but this Court held in

CompuCredit that these provisions failed to "do the heavy lifting" necessary to displace the FAA. 132 S. Ct. at 670.

The ADEA goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; see also *Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions."). If the CROA and the ADEA did not provide the necessary "contrary congressional command," Section 7's far vaguer reference to "concerted activit[y]" surely does not permit a different result.

2. Does Enforcing The Arbitration Agreement Waive A Right To Pursue Statutory Remedies Under The NLRA?

Parties seeking to invalidate arbitration agreements have also argued that—even in the absence of a clear congressional command overriding the FAA—the arbitration agreement should be invalidated because it would as a practical matter prevent a party from pursuing a remedy conferred by federal law.

This Court has held that an arbitration agreement is not protected by the FAA when it "operat[es] as a prospective waiver of a party's right to pursue statutory remedies." *Italian Colors*, 133 S. Ct. at 2310. That exception "finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.'" *Ibid.*; see also *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of

action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

a. *Does the right-to-pursue-statutory-remedies principle apply here?*

Background. The Court's precedents address this principle only in the context of arguments that arbitration as a practical matter prevents a claimant from invoking a cause of action conferred by a federal statute. Thus, this principle would bar enforcement of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and might also "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Italian Colors*, 133 S. Ct. at 2310-11.

Absent such restrictions, the right-to-pursue-statutory-remedies principle does not apply. For example, the parties' agreement to arbitrate in *CompuCredit* was enforceable because it preserved "*the legal power to impose liability*" under the CROA. 132 S. Ct. at 671 (emphasis in original). Similarly, in *Mitsubishi Motors*, this Court held that agreements to arbitrate antitrust claims were enforceable because a plaintiff could still "vindicate *its statutory cause of action* in the arbitral forum, [and] the statute [would] continue to serve both its remedial and deterrent function." 473 U.S. at 637 (emphasis added).

Analysis. Here, there is no claim that employees are unable to vindicate in arbitration a cause of action conferred by a federal statute. Rather, the argument is that Section 7 confers a right to engage in concerted litigation, and therefore overrides the

FAA's right to enforce contracts that preclude class actions.

But that assertion appears to collapse into the argument that the NLRA evinces a "contrary congressional command"—which is how the Court analyzes contentions Congress has displaced the FAA by authorizing procedures inconsistent with arbitration, such as by expressly providing for the filing of actions in court and vindication of a statutory right through class actions. See pages 7-8, *supra*. Applying the right-to-pursue-statutory-remedies principle in this different context would circumvent that legal standard.[4]

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[4] The Board insists that the right to participate in class and collective actions that it has read into Section 7 of the NLRA is "substantive," and references to class actions in other statutes are "procedural." But there is no principled basis for distinguishing Congress's express authorization of class actions in CROA and the ADEA from the Board's claimed authorization of class proceedings in Section 7—all confer legal authority to engage in class actions. In addition, regardless of the label affixed by the Board, the fact remains that a class action is a procedural device for pursuing a remedy. It is not the remedy itself. As this Court put it some 35 years ago, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank, Jackson, Miss.* v. *Roper*, 445 U.S. 326, 332 (1980) (emphasis added); see also, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-13 (1997) (noting that Rule 23 does not "'abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)).

b. *Does enforcing the arbitration agreement waive an employee's right to pursue statutory remedies under the NLRA?*

Even if the "effective remedy" cases could somehow be expanded to encompass claims of a statutory "right" to procedures—when the claimed "right" is too vague to displace the FAA under the contrary congressional command test—they could not save the *D.R. Horton* rule.

The threshold question under this analysis would be whether Section 7 of the NLRA creates a right to engage in class actions. Section 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. § 157.

The Board maintains that this right to engage in "concerted activit[y]" includes "the right to engage in the collective pursuit of work-related legal claims" in litigation, including through class actions. Pet. for Certiorari 10, No. 16-307 (citing *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 (1978), and *Brady* v. *Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011)).

But Section 7 does not mention litigation—and, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Social & Health Servs.*

v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted). The reference to "other concerted activities" in Section 7 therefore should be read to encompass activities similar to the three enumerated activities of self-organizing, participating in labor unions, and collective bargaining—not bringing class action lawsuits.[5]

If Section 7's protection could extend to concerted litigation activity, a class action is not "concerted" activity at all: "an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees." Pet. App. 148a, No. 16-307 (Member Johnson, dissenting). While a class action may affect the rights of absent class members, that alone has never been held sufficient to make an action "concerted" for Section 7 purposes. See *id.* at 148a-154a (examining cases and noting complete lack of support for Board's position that a class action is "concerted" activity).

Indeed, Section 7's reference to concerted activities cannot have been intended to confer a right to

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[5] The *Eastex* case cited by the Board involved the distribution of newsletters, not litigation. This Court stated only that "*it has been held that* the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"—citing lower court rulings in support of that proposition. 437 U.S. at 565-66 & n.15 (emphasis added). Moreover, the Court took the unusual step of expressly disclaiming any determination as to whether Section 7 encompasses litigation—by following its citation of those lower court decisions with the statement that "we do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15. *Eastex* therefore provides no support whatever for the contention that litigation-related activities are protected under Section 7.

engage in class actions, because the NLRA was enacted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362 (emphasis added); see also *Iskanian*, 327 P.3d at 141. Simply put, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362.

This Court employed precisely this reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309. So too here, because the NLRA long predated the advent of class actions, it cannot be read to protect a right to participate in class actions.

The Board argues, of course, that its ruling is entitled to deference. Pet. for Certiorari 12, No. 16-307. But because the NLRA unambiguously does not create a right to file class actions, no deference is warranted. See *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). And even if Section 7 were ambiguous, the question whether the *D.R. Horton* rule provides grounds for invalidating arbitration agreements is governed by the FAA—a statute for which the Board's interpretations are not entitled to deference. Thus, the Court must read the statute for itselt, without any deference to the Board's position, and the best reading is that Section 7 does not guarantee a right to class actions.

c. *Even if Section 7 creates a right to participate in class actions, does arbitration prevent effective vindication of Section 7 rights?*

Even if Section 7 could be read to create a right to participate in class actions, the Board would still have to show that arbitration on an individual basis prevents the effective vindication of that right. There are powerful arguments that it does not.

Employees who sign agreements to arbitrate on an individual basis can still engage in myriad forms of concerted activity, including striking, collective bargaining, and organizing. And even within the realm of litigation, employees are left free to communicate with co-workers about workplace problems, to exhort their co-workers to bring claims, to testify in each other's cases, to jointly retain the same counsel, to share evidence, and to pool resources to fund litigation. The *only* thing restricted by agreements to arbitrate on an individual basis is employees' ability to bring class actions.

Indeed, the Justices who dissented in *Italian Colors*—concluding that the arbitration agreement there violated the effective vindication principle by precluding collective action—expressly recognized that "the agreement could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism" for coordination among claimants. 133 S. Ct. at 2318 (Kagan, J., dissenting).

Moreover, the Board's position that the "right" to participate in class actions cannot be waived fails to acknowledge that just as the NLRA protects concerted activity, it also protects the right of employees to

"refrain from" concerted activity. 29 U.S.C. § 157. And in Section 9(a), it guarantees "any individual employee * * * the right at any time to present grievances to their employer and to have such grievances adjusted." *Id.* § 159(a). Thus, as a dissenting Board member has explained, "[t]aken together, Section 9(a) and Section 7 compel a conclusion that Congress intended for employees and employers—and not the NLRB—to choose for themselves *whether* to pursue non-NLRA disputes on a 'collective' versus 'individual' basis." Pet. App. 124a, No. 16-307 (Member Miscimarra, dissenting).

The right-to-pursue-statutory-remedies argument thus fails for three separate reasons: that principle is not applicable when, as here, there is no showing that arbitration will prevent the plaintiff from litigating a federal cause of action; Section 7 does not create a right to bring class actions; and, even if it does, enforcement of the arbitration agreement does not prevent vindication of that "right."

3. Is The D.R. Horton *Rule A Basis "At Law Or In Equity For The Revocation Of Any Contract"?*

Background. The FAA's "savings clause" provides that an arbitration agreement may be held unenforceable "upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. Parties seeking to invalidate arbitration agreements have invoked this clause to argue that various state law contract principles are protected against preemption by the savings clause.

In rejecting many such contentions, this Court has held that the exception created by the savings clause is narrow. It allows "agreements to arbitrate

to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Based on that precedent, this Court has held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Italian Colors*, 133 S. Ct. at 2308 (internal quotation marks omitted).

The NLRB, in its petition for certiorari in No. 16-307, nonetheless relies principally on the savings clause as the ground on which the *D.R. Horton* rule can be sustained. Indeed, the NLRB's question presented focuses exclusively on this line of argument. (The Seventh and Ninth Circuits also relied principally on the savings clause in upholding the *D.R. Horton* rule.)

Analysis. The NLRB's reliance on the savings clause is curious, because *none* of this Court's previous decisions addressing the interplay between the FAA and another federal statute has even mentioned the savings clause.

The contention that the *D.R. Horton* rule falls within the savings clause rests on the following syllogism: Under the savings clause, arbitration agreements can be invalidated based on "such grounds as

exist at law or in equity for the revocation of any contract"; illegality is a generally applicable ground for invalidating contracts; the NLRA (according to the Board in *D.R. Horton*) makes agreements to arbitrate disputes on an individual basis illegal, because such agreements infringe upon employees' Section 7 right to engage in "concerted activity"; thus, the NLRA's prohibition is covered by the savings clause. See Pet. App. 14a-15a; Pet. App. 17a, No. 16-300; Pet. for Certiorari 13-14, No. 16-307.

But that is the precise syllogism that the respondents in *Concepcion* invoked in defense of California's *Discover Bank* rule. Like the *D.R. Horton* rule, the *Discover Bank* rule "conditioned the enforcement of arbitration on the availability of class procedure," either in court or in arbitration. See *Italian Colors*, 133 S. Ct. at 2312. The California Supreme Court announced in *Discover Bank* that a class waiver—whether in an arbitration agreement or otherwise—is an unenforceable exculpatory clause when it "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

The respondents in *Concepcion* argued that "[t]he savings clause expressly preserves state-law contract principles that do not discriminate against arbitration"; that "'the principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California

law that does not specifically apply to arbitration agreements, but to contracts generally'"; and that "[t]he approach courts have taken to class-action bans in nonarbitration agreements * * * demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." Br. for Resp'ts at 13, 21, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *13, *21 (quoting *Discover Bank*, 113 P.3d at 1112).

This Court flatly rejected that syllogism. It explained that "[a]lthough § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Observing that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

The same is true of the NLRB's rule conditioning enforcement of employment arbitration agreements on the availability of class procedures. *Concepcion* therefore compels the conclusion that the *D.R. Horton* rule falls outside the savings clause.

The Board and the Seventh and Ninth Circuits attempt to distinguish *Concepcion* on various grounds, none of which withstands scrutiny. First, they argue that Section 7's protection of concerted

activity does not "discriminate" against arbitration. That argument was made and rejected in *Concepcion*: the respondents asserted that "[t]he state does not treat arbitration agreements in a manner different from that in which it otherwise construes nonarbitration agreements" and that "California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses," which is "applicable to all contracts and codified in California's law since 1872." Br. for Resp'ts at 18, 19, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *18, *19 (internal quotation marks omitted).

This Court held that facial neutrality is insufficient, explaining that if a generally applicable contract defense is "applied in a fashion that disfavors arbitration" or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it falls outside the savings clause. *Concepcion*, 563 U.S. at 341, 343. Thus, as the California Supreme Court observed in holding that the *D.R. Horton* rule cannot be reconciled with the FAA, "*Concepcion* makes clear that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141.

Second, the Board and the Seventh and Ninth Circuits argue that the *D.R. Horton* rule does not run aground on *Concepcion* because it leaves employers free to insist on bilateral arbitration so long as class procedures are available to employees in court. But the *Concepcion* respondents, too, pointed out that "California law is neutral as to whether classwide

proceedings take place in arbitration or in court." Br. for Resp'ts at 54, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *54.

This Court held, however, that such a hybrid approach was precluded by the FAA because it would undermine the objectives of arbitration. Although consumers would remain free to bring and resolve their disputes on a bilateral basis, there would be "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process"—"faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Concepcion*, 563 U.S. at 347.

Finally, the Board and the Seventh and Ninth Circuits have argued that *Concepcion* is distinguishable because it involved a state-law rule, whereas here a federal statute must be reconciled with the FAA. But the savings clause draws no distinction based on *the source* of the supposedly neutral contract-law defense. Moreover, while this Court did hold in *Concepcion* that "nothing in [Section 2's savings clause] suggests an intent to preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives" (563 U.S. at 343 (emphasis added)), it made clear in *Italian Colors* that the same principle applies to federal-law rules. 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 344).

Most importantly, if the Board were correct that the savings clause covers the *D.R. Horton* rule, a state statute purporting to guarantee individuals the right to "concerted action" would also fall within the savings clause. Yet that is exactly what California

courts already attempted to do in *Discover Bank*—and what *Concepcion* held the FAA forbids. Accordingly, "in light of *Concepcion*," such a reading of the NLRA "is not covered by the FAA's savings clause." *Iskanian*, 327 P.3d at 141.

That the *D.R. Horton* rule is the creation of a federal agency *is* relevant, but not to the savings clause. Rather, it brings into play the question whether, in enacting the NLRA, Congress authorized the Board to override the FAA. As we have explained (see pages 7-10, *supra*), there is no credible argument that Congress did so.

II. GRANTING THE PETITIONS IN THESE TWO CASES IS ESSENTIAL TO PUT BEFORE THE COURT THE FULL RANGE OF RELEVANT ISSUES.

As explained above, the Court will have to undertake three overarching inquiries to resolve definitively the validity of the Board's *D.R. Horton* rule—analyzing the "contrary congressional command" issue; the right-to-pursue-statutory-remedies issue (and its several sub-issues); and the savings clause issue.

The question presented by the government in *Murphy Oil*, however, asks the Court to resolve only the savings clause issue. Granting only that petition would not put before the Court all of the issues that must be resolved in order to determine definitively whether the *D.R. Horton* rule is valid.

For that reason, the Court should grant the petitions in these two cases, regardless of whether it also grants the government's petition. Both of these petitions frame the question presented broadly, and therefore clearly capture all of these threads.

The Court frequently grants multiple petitions when necessary to ensure a full presentation of all relevant legal issues. See *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2172 (2016); *Zubik* v. *Burwell*, 136 S. Ct. 1557, 1560 (2016) (per curiam); *Riley* v. *California*, 134 S. Ct. 2473, 2481-82 (2014). It should follow that same approach here.

CONCLUSION

The petitions for writs of certiorari in these two cases should be granted.

Respectfully submitted.

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

OCTOBER 2016

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 3 - 2016
OFFICE OF THE CLERK

No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment
Advisory Council

October 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

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IN THE

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EPIC SYSTEMS CORPORATION,

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v.

JACOB LEWIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many of them thus have adopted company-wide policies requiring the use of binding arbitration to resolve such disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation. The issues presented in this case thus are extremely important to the nationwide employer constituency that EEAC represents.

Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to establish clear standards and criteria against which

their future conduct will be judged. Accordingly, such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract. Disregarding these well-established legal principles and according undue deference to the National Labor Relations Board's (NLRB) *D.R. Horton* ruling, the Seventh Circuit below incorrectly held that an agreement requiring employees to submit their work-related disputes to binding arbitration as a condition of employment, but which contains a clause barring class-based or collective claims, impermissibly restricts the right of employees to engage in protected concerted activity for their "mutual aid and protection," in violation of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Jacob Lewis worked for Petitioner Epic Systems Corporation (Epic) as a technical writer. Pet. App. 24a. In April 2014, Epic sent an email to staff advising that the company would now require that all wage and hour disputes be submitted to binding, individual arbitration. *Id.* at 2a. The agreement contained an express clause barring class, collective, and representative proceedings, which specified that if the class waiver were ever deemed unenforceable, any class-based claim would have to be brought in court.

Id. Employees were required to agree as a condition of employment. *Id.*

Sometime thereafter, Lewis sued Epic in federal court, accusing the company of misclassifying him and others similarly situated as exempt in violation of the Fair Labor Standards Act (FLSA). *Id.* Pointing to the agreement to arbitrate, Epic moved to dismiss the action and to compel individual arbitration of Lewis's claims. *Id.* Lewis responded that the arbitration agreement was unconscionable and thus unenforceable. *Id.* at 2a-3a. Alternatively, he contended that the class waiver provision impermissibly interfered with the right of employees to engage in protected concerted activities under Section 7 of the NLRA, 29 U.S.C. § 157, and therefore was unlawful. *Id.* at 3a.

Deferring to the NLRB's position on the question, the trial judge held that the class waiver was inconsistent with the NLRA's "concerted activity" protections. *Id.* It found there to be no conflict with the FAA, because the FAA does not mandate enforcement of arbitration agreements that "conflict with substantive provisions" of other federal laws, like the NLRA. *Id.* at 27a. Therefore, the trial court refused to dismiss Lewis's court claim and order him into arbitration. *Id.* at 28a-29a.

Epic appealed to the Seventh Circuit, which affirmed. *Id.* at 2a. Like the trial court, the appeals court accorded great deference to the Board's view that class waivers impermissibly interfere with employee Section 7 rights, and therefore are unenforceable under the NLRA. *Id.* at 23a. Epic filed a petition for a writ of certiorari with this Court on September 2, 2016.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Seventh Circuit below, relying on the National Labor Relations Board's discredited administrative ruling in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), incorrectly held that an employment arbitration agreement containing a class waiver provision unlawfully deprives employees of their right under Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157, to engage in protected concerted activity. Embracing the Board's wrong-headed analysis, the lower court found that Section 7 protection extends to the ability of employees to join together in class proceedings, and that access to such procedures is a non-waivable, "substantive" right. Pet. App. 27a. Because it conflicts with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, as construed repeatedly by this Court, and deepens an already well-defined conflict in the courts on this question, review and reversal of the decision below is warranted.

The FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility, Inc. v. Concepcion*, 563 U.S. 333, 339 (2011). The Act "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). Thus, only generally applicable contract defenses, such as fraud, duress, or unconscionability, can be used to invalidate an arbitration agreement.

Among the FAA's foundational principles is "'that arbitration is a matter of consent, not coercion.'" *Stolt-*

Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010). Indeed, "'[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*, 470 U.S. at 218 (citations omitted).

In *AT&T Mobility LLC v. Concepcion*, this Court once again made clear that rules imposing burdens on arbitration agreements that do not exist for other types of contracts are incompatible with, and thus displaced by, the FAA. 563 U.S. 333 (2011). The NLRB's *D.R. Horton* decision – on which the Seventh Circuit relied to invalidate an arbitration agreement simply because it contained a class waiver provision – is such a rule. In addition to contravening the strong federal policy favoring arbitration, the *D.R. Horton* rule, which in effect establishes an across-the-board ban on class waivers, also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes.

For employees, the speed of resolving disputes through arbitration can be particularly advantageous, especially for those who will continue their employment well after their claims have been addressed. For employers, the well-recognized practical and financial advantages of arbitration are likely to disappear

altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. As this Court observed in *Concepcion*, for example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

The *D.R. Horton* rule – which has been embraced by two courts of appeals, but categorically rejected by three others – thus creates a chilling effect on employers' efforts to establish binding arbitration programs, making it extremely difficult to effectuate the aims and practical benefits underlying employment arbitration. Persistent questions in the courts regarding its validity threaten to deprive employers and employees of the many well-established benefits afforded by an arbitral forum, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348 (citation omitted).

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The *D.R. Horton* Rule Endorsed By The Court Below Cannot Be Reconciled With This Court's Repeated Admonition That Arbitration Agreements Are To Be Enforced In Accordance With Their Terms

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This Court has repeatedly reaffirmed the federal policy favoring arbitration, noting that the FAA was enacted in 1925 in an effort to curb "widespread judicial hostility to arbitration agreements," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted); *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

Section 2 of the FAA is the "primary substantive provision" of the Act. *Gilmer*, 500 U.S. at 24. This section has been described as "reflecting both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of

contract.'" *Concepcion*, 563 U.S. at 339 (citations omitted); *see also Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Indeed, this Court has declared "on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). *See also Concepcion*, 563 U.S. at 344 ("The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) ("'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate'") (citation omitted). Accordingly, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

In judging the arbitration agreement in the instant case to be an unlawful restraint on employee rights under Section 7 of the NLRA simply because it contained a class waiver provision, the Seventh Circuit disregarded this Court's settled FAA jurisprudence, and instead embraced a controversial, legally unsupportable policy position invented by the NLRB just four years ago. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In doing so, it deepened the conflict in the courts of appeals on an important issue affecting businesses and their employees nationwide.

The Seventh Circuit sidestepped Epic's assertion that the FAA expresses a federal policy favoring arbitration in accordance with the parties' written agreement, and that forcing employers into class arbitration improperly interferes with arbitration, in violation of the Act. Pet. App. 1a-2a. It interpreted the NLRA as creating a *substantive* right to engage in collective action for the "mutual aid and protection" of employees and that such a right necessarily includes access to the class action device. Pet. App. 3a. Accordingly, it concluded that because class waivers violate a substantive right, they are illegal and thus subject to invalidation under the FAA's savings clause.

In so holding, the Seventh Circuit expressly endorsed the NLRB's controversial decision in *D.R. Horton*, which held that the ability to file employment-related claims on a class or collective basis is protected conduct under NLRA Section 7, and the agreement in question – which prohibited such activity – unlawfully interferes with, restrains and/or coerces employees seeking to assert their Section 7 rights, in violation of Section 8(a)(1) of the Act. There, the Board declared for the first time that barring enforcement of agreements containing class action waivers does not impermissibly conflict with the FAA "or undermine the pro-arbitration policy" on which it is based, *D.R. Horton*, 357 N.L.R.B. at 2285, because such an agreement "interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." *Id.* at 2286. In the Board's view, its broad interpretation of Section 7 rights under the NLRA does not conflict at all with what it characterized as the FAA's policy "permitting" enforcement of private arbitration agreements. *Id.* at 2285. Even assuming such a conflict did exist, the Board reasoned that its construction "represents an

appropriate accommodation of the policies underlying the two statutes." *Id.* at 2284.

On the contrary, to the extent that the Board's rationale, on which the decision below rests, effectively precludes enforcement of any employment arbitration agreement containing a class waiver provision, it conflicts directly with the FAA and represents an unjustifiable departure from this Court's FAA jurisprudence. Accordingly, review of the decision below is warranted.

B. The Decision Below Magnifies The Conflict In The Courts Regarding Whether The Availability Of Class Procedures Is A Non-Waivable, Substantive Right Under The National Labor Relations Act

1. The Fifth, Eighth and Second Circuits have categorically rejected the *D.R. Horton* rule as contrary to the FAA

This Court made clear in *AT&T Mobility LLC v. Concepcion* that rules purporting to place burdens on arbitration agreements that do not exist for other types of contracts are incompatible with the FAA, and therefore are invalid. 563 U.S. 333 (2011). Since *Concepcion*, most courts have come around to the idea that the mere presence of a class waiver clause in an otherwise enforceable arbitration agreement simply is not enough to declare it unenforceable. In fact, "[b]efore the NLRB inserted itself into what appeared to be a well-settled legal dialogue, existing policy and Supreme Court precedent generally favored the enforcement[ ] of arbitration agreements containing class waivers." Laura L. Mall, *Practical Implications*

of Murphy Oil *on Employee Waivers: An Ecological Disaster or a Dissenter's Pipeline to Freedom*, 89-MAY Fla. B.J. 38 (2015). And soon after *D.R. Horton* was decided, courts began to uniformly reject the Board's rationale as unsound, including the Fifth Circuit – which in fact reversed the ruling in all material respects. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

As a threshold matter, the Fifth Circuit fundamentally disagreed with the Board's contention that class waivers are categorically prohibited by the NLRA. Acknowledging that the Act was intended to strengthen employee bargaining rights by providing for collective activity, and that the Board and some courts have held that an employee's right to pursue class or collective actions constitutes protected concerted activity, the court also pointed out that no court had ever interpreted the NLRA to impose a categorical prohibition on the enforcement of class waivers contained in arbitration agreements. While the Board's rationale might carry sway were the NLRA the only statute implicated, the court found that the FAA "has equal importance" to resolution of the issue. 737 F.3d at 357. Indeed, the body of case law decided under the FAA "points us in a different direction than the course taken by the Board." *Id.*

The Fifth Circuit found that like the California law at issue in *Concepcion*, the Board's decision purports to effectively impose an across-the-board ban on class waivers – the effect of which is to disfavor arbitration. It observed, "As *Concepcion* held as to classwide arbitration, requiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'" *Id.* at 359-60 (citation omitted). Because

Congress failed to include in the NLRA a non-waivable right to class or collective procedures, the Fifth Circuit found that the Board was not at liberty to disregard the FAA's command that arbitration agreements be enforced according to their terms – including those limiting the availability of class procedures. Moreover, "Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *Id.* at 361.

In so ruling, the Fifth Circuit observed that every other federal court of appeals to have weighed in on the issue at that point had "either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." *Id.* at 362 (citations and footnote omitted). In *Owen v. Bristol Care, Inc.*, for instance, the Eighth Circuit reversed a trial court ruling that relied on the Board's *D.R. Horton* rule in refusing to enforce arbitration of a claim brought under the Fair Labor Standards Act, simply because the arbitration agreement contained a class action waiver clause. 702 F.3d 1050 (8th Cir. 2013). The court explicitly rejected the Board's interpretation as incompatible with the FAA's pro-arbitration policy, concluding instead that courts are *required* (not merely *permitted*) to enforce arbitration agreements according to their terms unless Congress specifically has said otherwise. It then observed that nothing in the FLSA indicates that Congress intended to bar employees from either agreeing to arbitrate their FLSA claims or from agreeing to do so individually. *Owen*, 702 F.3d at 1052.

Likewise, the Second Circuit in *Sutherland v. Ernst & Young, LLP* held that a plaintiff who brought FLSA overtime claims on behalf of herself and others

similarly situated could not get out of the arbitration pledge she signed as a condition of employment simply by arguing that the high costs of litigating on an individual basis "would dwarf her potential recovery of less than $2,000." 726 F.3d 290, 294 (2d Cir. 2013) (*per curiam*) (footnote omitted). Examining the FLSA's text, as well as this Court's decision in *American Express Co. v. Italian Colors Restaurant*,[2] the court joined the Eighth Circuit in concluding that nothing in the Act's text or legislative history indicates a congressional intent to forbid enforcement of class waiver clauses contained in mandatory arbitration agreements. In doing so, it reaffirmed its prior holding that "the FLSA collective action 'right'" is merely procedural in nature. *Sutherland*, 726 F.3d at 297 n.6 (citation omitted). As particularly relevant here, it also expressly rejected the plaintiff's contention that it should defer to the Board's rationale in *D.R. Horton*. *Id.* at 297 n.8.

2. The Seventh and Ninth Circuits now agree with the NLRB that class waivers violate the NLRA and therefore are unenforceable

Although the Second and Eighth Circuits both have joined the Fifth Circuit in rejecting the Board's anti-class waiver interpretation, the Seventh Circuit below became the first federal appeals court to embrace it, holding that the NLRA creates a substantive right to engage in collective action for the "mutual aid and protection" of employees, Pet. App. 3a, and to the extent that a class waiver violates an employee's right to engage in such protected concerted activities, it violates the Act. Pet. App. 1a-2a. Exacerbating the

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[2] 133 S. Ct. 2304 (2013).

growing conflict in the courts on this question, the Ninth Circuit shortly thereafter similarly held in *Morris v. Ernst & Young, LLP* that an arbitration agreement requiring employees to submit to binding, individual arbitration is incompatible with the "substantive right" of employees to engage in protected concerted activity under the Act. __ F.3d __, 2016 WL 4433080, at *2 (9th Cir. 2016), *petition for cert. filed*, No. 16-300 (Sept. 8, 2016). According to the Ninth Circuit, the ability of employees to collectively "pursue work-related legal claims" is an extension of their right to engage in concerted activity. *Id.* at *5.

Agreeing with the Seventh Circuit's rationale, the Ninth Circuit in *Morris* found that restrictions on class procedures are the "very antithesis" of NLRA-protected rights. *Id.* It rejected the contention that its interpretation is somehow anti-arbitration, expressing the view that the arbitration agreement in question is "not the problem." *Id.* at *6. Rather, the "NLRA obstacle is a ban on initiating, in any forum, concerted legal claims." *Id.* In other words, had the agreement in that case imposed binding arbitration but not imposed a restriction on class-based proceedings, the NLRA would not have been implicated. Such a conclusion is directly at odds with the FAA principles articulated by this Court, especially as stated in *Concepcion*.

In the wake of its *D.R. Horton* ruling, "numerous class and collective action litigants have been waiting for years to learn whether the Board can prohibit nonunion companies from including a waiver of such actions in a mandatory employment arbitration agreement." Zev J. Eigen & Sandro Garofalo, *Less is More: A Case For Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1901

(2014) (footnote omitted). Five courts of appeals are hopelessly at odds on the question, and because the Board has pledged to continue pressing its controversial rule in the courts, the divide is likely to only grow.

Indeed, the Board "is likely to follow *D.R. Horton* absent a contrary ruling by [this] Court or the election of a new Administration and subsequent replacement of Board members." Stacey L. Pine, *Employment Arbitration Agreements and the Future of Class-Action Waivers*, 4 Am. U. Lab. & Emp. L.F. 1, at *24 (2014). As one commentator observed:

> The peril to employers is that while employers can appeal decisions of the NLRB to the federal courts, there is significant cost associated with doing so and the contradictory decisions of the NLRB that currently exist create much uncertainty relative to outcome. Additionally, this ruling puts employers who currently have agreements that prohibit class litigation and arbitration at considerable risk for charges of unfair labor practices by the NLRB as employees and unions will inevitably begin to challenge such agreements.

Id.

C. Without Definitive Guidance From This Court, The NLRB Will Continue To Enforce The *D.R. Horton* Rule Under Its Policy Of "Non-Acquiescence," To The Detriment Of Employers And Employees Alike

Although the Board's anti-class waiver ruling in *D.R. Horton* was reversed by the Fifth Circuit, and its underlying rationale categorically rejected by the Second and Eighth Circuits, the Board is expected to

continue its full-throated assault on class waivers until this Court directs otherwise. Indeed, the Board has doubled-down on its so-called policy of "non-acquiescence," despite being roundly criticized for doing so. As the Fifth Circuit observed in *Murphy Oil*:

> Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in law or fact or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1021 (5th Cir. 2015), *petition for cert. filed*, No. 16-307 (Sept. 9, 2016); *see also Heartland Plymouth Court MI, LLC v. NLRB*, __ F.3d __, 2016 WL 5485145 (D.C. Cir. 2016) ("facts may be stubborn things, but the Board's longstanding 'nonacquiescence' towards the law of any circuit diverging from the Board's preferred national labor policy takes obduracy to a new level").

Thus far, the Board has declined to follow the Fifth Circuit's sound advice. *See, e.g., U.S. Xpress Enters., Inc.*, 363 NLRB No. 46, 2015 WL 7750745, at *4 (N.L.R.B. Nov. 30, 2015) ("the Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of the particular case"). As a consequence, employers with arbitration agreements containing class waivers face an unavoidable risk that those agreements will be invalidated by the Board. By embracing the Board's rule, the Seventh Circuit's decision below elevates that risk, and "effectively cripples the ability of employers and employees to

enter into binding agreements to arbitrate." *Morris*, 2016 WL 4433080, at *12 (Ikuta, J., dissenting).

II. IMPOSING CLASS ARBITRATION EVEN WHERE THE UNDERLYING AGREEMENT CONTAINS AN EXPRESS CLASS ACTION WAIVER PROVISION FUNDAMENTALLY WOULD ALTER THE EXPECTATIONS OF BOTH EMPLOYERS AND EMPLOYEES BY IMPOSING THE VERY COSTS AND BURDENS SOUGHT TO BE AVOIDED BY FORGOING CLASS PROCEDURES

Allowing the *D.R. Horton* rule to stand not only would significantly increase the cost of arbitration but also would defeat most, if not all, of the practical benefits of arbitration over litigation. Taking the decision as to whether class arbitration is permitted out of the hands of the parties and instead allowing the Board to dictate the terms of such private agreements would be contrary to the strong federal policy favoring arbitration and a disservice to the interests of employers and employees alike.

As this Court observed in *Mitsubishi*, "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 473 U.S. at 626-27. The outmoded hostility to arbitration agreements generally, and those containing class action waivers specifically, is particularly misplaced in the employment context, where arbitration offers significant mutual advantages.

From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view

arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed.[3] Indeed, there are "real benefits to the enforcement of arbitration provisions," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001), including significant cost savings, "a benefit that may be of particular importance in employment litigation ...." *Id.* at 123.

The financial benefits that employees derive from arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration, despite having agreed to waive such procedures. In addition to increasing the costs, adjudicating claims on a class-wide basis brings a level of complexity that undermines many of the core advantages of arbitration. Among other things:

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable

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[3] Furthermore, an individual's waiver of class action procedures will not affect the ability of other private parties not subject to arbitration agreements or public enforcement agencies to pursue class-wide relief. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (allowing Equal Employment Opportunity Commission to seek victim-specific relief in court – whether on behalf of an individual or an entire class – even when employees have signed an arbitration agreement).

> in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured ... rather than consensual, is inconsistent with the FAA.

Concepcion, 563 U.S. at 348.

Thus, despite the Board's views to the contrary – which now have been embraced by two courts of appeals, but firmly rejected by three others – allowing an arbitration to proceed as a class action despite unambiguous contractual language barring such procedures would profoundly undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See, e.g.*, 42 U.S.C. § 1981a.

Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure ... no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially

> frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. ... And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id. at 686.

For employers, there are significant financial advantages to arbitration that are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. Allowing an arbitration to proceed on a class-wide basis where the parties have agreed not to do so defeats most, if not all, of those aims. Besides the statutory mandate that arbitration agreements be enforced according to their terms, "[f]or parties to employment contracts ... there are real benefits to the enforcement of arbitration agreements." *Circuit City Stores*, 532 U.S. at 122-23. As this Court observed over a decade ago:

> We have been clear in rejecting the supposition that the advantages of the arbitration process

> somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Id. at 123 (citation omitted). Imposing class action procedures on parties who expressly agreed to waive such procedures in favor of bilateral arbitration changes the nature of arbitration to such a degree that it becomes a burden on the parties, rather than a means of resolving their dispute efficiently and in a less costly manner.

The risk is especially acute in the employment context. Class-based employment claims can be extremely complex and time-consuming to defend. Title VII[4] damage claims, for instance, require particularized analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found. Attempting to resolve Title VII class-based claims in arbitration would not be particularly efficient or cost-effective. Moreover, allowing class arbitration of employment disputes would enable savvy plaintiffs to avoid the strict requirements of, and deny defendants the due process protections afforded by, the federal procedural rules governing class action litigation. No rational employer would be willing to assume such a serious risk.

Without definitive guidance from this Court, the Board and lower courts following its anti-arbitration

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[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*

policy will impose unfounded restrictions making it profoundly difficult, if not impossible, for employers to maintain alternative dispute resolution programs containing a bilateral arbitration component. The prospect of having to perpetually re-litigate the enforceability of their arbitration agreements creates a chilling effect on employers' efforts to establish uniform and consistent workplace arbitration programs, and significantly undercuts the strong federal policy, as endorsed repeatedly by this Court, favoring private arbitration of employment disputes.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment
Advisory Council

October 2016

RECORD AND BRIEFS

No. 16-285

Supreme Court, U.S.
FILED
SEP 30 2016
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v

JACOB LEWIS,

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

MARY-CHRISTINE SUNGAILA
Counsel of Record
HAYNES AND BOONE, LLP
600 Anton Blvd , Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC Sungaila@
haynesboone com

ALEX R STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave , Suite 700
Dallas, TX 75219
(214) 651-5475
Alex Stevens@
haynesboone com

Attorneys for Amicus Curiae
International Association of Defense Counsel

September 30, 2016

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INTEREST OF *AMICUS CURIAE*[1]

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of the IADC in the benefits of arbitration is exemplified by its participation as amicus before this Court in several cases concerning federal arbitration law, including, inter alia, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of the *amicus*' intent to file this brief under Sup. Ct. R. 37.2(a), and all parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs or have separately consented to the filing of this brief.

(2013) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

SUMMARY OF THE ARGUMENT

As Epic System Corporation's petition for writ of certiorari makes clear, there is an undisputed, deepening circuit split – originating with the Seventh Circuit's opinion in this case – concerning an issue of federal statutory interpretation and the enforceability of arbitration agreements with class action or collective action waivers in the employment context. In this amicus brief, we provide additional reasons why this Court's guidance concerning the impact of the National Labor Relations Act (NLRA) on the enforceability of such arbitration agreements under the Federal Arbitration Act (FAA) is needed now, and not later.

In the decision below, the Seventh Circuit became the first federal circuit court of appeals to hold that employer-employee agreements to arbitrate employment disputes on an individual basis are impermissible restrictions on employees' rights to act in concert under the NLRA and therefore unenforceable under the FAA. The Seventh Circuit reached this conclusion by improperly beginning with an analysis of whether such agreements could be deemed unlawful under the NLRA and then looking to whether the FAA changed this result. The Seventh Circuit should have begun with the presumption of enforceability required by the FAA and this Court's prior decisions.

This Court should grant review now because the Seventh Circuit's decision opens the door to increased collateral unfair labor practice litigation before the National Labor Relations Board (NLRB) for employers across the country. Where employers seek to compel individual arbitration of employment disputes pursuant to a lawful arbitration agreement, they may face unfair labor practice charges from the NLRB asserting that, by seeking to compel arbitration, they committed an unfair labor practice[2] – even if they successfully compelled arbitration in a jurisdiction that enforces arbitration agreements with class action waivers. And because the NLRA's broad appellate venue provisions preclude any certainty regarding where such NLRB decisions may be heard on appeal, there is no guarantee that an appeal of an NLRB order invalidating an arbitration agreement and declaring an employer to have engaged in an unfair labor practice will be heard in the same jurisdiction as the one that heard the motion to compel arbitration.

Thus, the uncertainty created by the circuit split concerning the enforceability of employment arbitration agreements has repercussions across the country.

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[2] This approach amounts to punishing an employer for invoking its arbitration rights and improperly threatens the "emphatic federal policy in favor of arbitral dispute resolution" underlying the FAA, which this Court has reaffirmed multiple times. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3356 (1985).

As a result, this Court should not wait for the circuit split to deepen even further before taking up the issue.

ARGUMENT

I. The Seventh Circuit's Analysis Incorrectly Burdens the Proponent of Arbitration in Contravention of this Court's Analysis in *CompuCredit Corp. v. Greenwood.*

The FAA declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA, and FAA section 2 in particular, was intended to "'revers[e] centuries of judicial hostility to arbitration agreements,' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'" *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974)). The FAA reflects "a 'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)). This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 563 U.S. at 339 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)); *see also Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468,

479 (1989), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 563 U.S. at 339.

This Court has repeatedly upheld agreements requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352. And this Court has further explained that these principles apply "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). These principles have been applied equally to employment disputes, even where the claims at issue implicated federal statutes that expressly provide for class or collective action litigation. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (employee's claims under the Age Discrimination in Employment Act must be arbitrated "even if the arbitration could not go forward as a class action").

In contravention of this Court's precedent, the NLRB determined in 2012 that agreements requiring individual arbitration of employment disputes unlawfully interfere with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under NLRA Section 7. *D.R. Horton, Inc.*, 357 NLRB 2277, 2279 (2012); *see also* 29 U.S.C. § 157. The NLRB further concluded that such agreements violate NLRA Section

8(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." *Id.* at 2280; *see also* 29 U.S.C. § 158(a)(1). The NLRB accordingly ordered the employer-respondent to cease and desist from invoking a mandatory arbitration agreement with class and collective action waivers, and to rescind or revise its existing arbitration agreement to clarify that it did not constitute a waiver of the right to maintain employment-related class or collective actions. *Id.* at 2289.

NLRB orders are not self-enforcing. Rather, if an employer does not voluntarily comply with a remedial order issued by the NLRB, the NLRB may file a petition for enforcement with a United States circuit court of appeals within any circuit where the unfair labor practice in question occurred or where the person alleged to have committed an unfair labor practice resides or transacts business. 29 U.S.C. § 160(e). Similarly, "any person aggrieved by a final order of the [NLRB]" may obtain judicial review and seek to have the order modified or set aside by "any United States court of appeals in the circuit in which the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business," or in the D.C. Circuit. 29 U.S.C. § 160(f). The employer-respondent in *D.R. Horton* filed a petition for review in the Fifth Circuit, and the NLRB filed a cross-application for enforcement. The Fifth Circuit ultimately refused to enforce the portion of the NLRB's order invalidating the employer's arbitration agreement

on the basis of its class and collective action waivers, finding the NLRB's hostility to such waivers in employee arbitration agreements to be incompatible with the FAA. *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 364 (5th Cir. 2013).

Despite the Fifth Circuit's refusal to enforce the NLRB's order in *D.R. Horton*, employee-plaintiffs have begun citing the NLRA in opposition to employer-defendants' attempts to enforce agreements to arbitrate employment disputes on an individual basis. Until recently, this argument met little success. The Second and Eighth Circuits and the Supreme Courts of California and Nevada all joined the Fifth Circuit in rejecting the argument that the NLRA renders unenforceable employee-employer agreements to resolve employment disputes in individual arbitration. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122-23 (Nev. 2015).

But the Seventh Circuit in this case, followed by the Ninth Circuit, *see Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), petition for cert. pending, Case No. 16-300, reached the opposite conclusion in employment cases involving motions to compel arbitration, concluding that arbitration agreements with class or collective action waivers were unenforceable under the NLRA. Both decisions relied

on the FAA's savings clause, which creates an exception to the FAA's presumption of enforceability "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and rejected this Court's prescribed analysis in *CompuCredit*, under which courts are required to determine whether another federal statute like the NLRA contains a "contrary congressional command" to that of the FAA. 132 S. Ct. at 669.

In this case, the Seventh Circuit concluded that performing the analysis required by *CompuCredit* would "put[] the cart before the horse" and instead began its analysis with the NLRA, determining that the "concerted activities" protected by NLRA Section 7 included "filing a collective or class action suit." Pet. App. 13a. The court then concluded that because "the provision at issue is unlawful under Section 7," it "meets the criteria of the FAA's savings clause for nonenforcement." *Id.* at 15a. Similarly, the Ninth Circuit concluded that NLRA Section 7 creates a "substantive right" to the collective pursuit of "work-related legal claims" and that an employment arbitration agreement with a class or collective action waiver "interferes with" concerted legal action, and "cannot be enforced." *Morris*, 2016 WL 4433080 at **11-15. Like the Seventh Circuit, the Ninth Circuit relied on the FAA's savings clause to conclude that the FAA "does not dictate a contrary result." *Id.* at *17.

In reaching these conclusions, the Seventh and the Ninth Circuits have inverted this Court's FAA jurisprudence by beginning with the NLRA and requiring

the proponent of arbitration to show that the FAA overrides the NLRA, rather than beginning with the FAA's presumption that arbitration agreements are enforceable as written. *See* 9 U.S.C. § 2. This backwards framework is inimical to the policies underlying the FAA.

II. The NLRA's Broad Appellate Jurisdiction Provisions Ensure that the Split of Authority Concerning the Enforceability of Employment Arbitration Class or Collective Action Waivers Will Reverberate Across the Country.

The Seventh and Ninth Circuits' hostility to arbitration agreements with class action waivers affects employers outside those circuits. This is because both courts' decisions pave the way for employee-plaintiffs opposing arbitration to file collateral unfair labor practice charges against employers who seek to assert their rights under the FAA.

As Petitioner's brief notes (*see* p. 18), the logical consequence of the position that class and collective litigation is a protected "substantive" right is that any employer opposition to class or collective actions via efforts to enforce a provision requiring individual arbitration unlawfully "interferes with" this putative "right" in violation of NLRA Section 8(a)(1). *See* 29 U.S.C. § 158(a)(1). In accordance with this interpretation, the NLRB has not limited itself to ordering employers to rescind or revise arbitration agreements

with class or collective action waivers, as it did in *D.R. Horton*. Instead, the NLRB has taken its hostility to such agreements to its logical conclusion, ordering employers to reimburse employee-plaintiffs for fees spent opposing motions to compel individual arbitration. *See, e.g., Bloomingdale's, Inc.*, 363 NLRB No. 172, 2016 NLRB LEXIS 314 at *26 (Apr. 29, 2016).

Neither the FAA nor this Court's prior decisions support treating efforts to enforce lawful, valid arbitration agreements like a poison pill that invites significant litigation costs and collateral litigation. Nevertheless, attorneys representing plaintiffs[3] in employment class actions have already seized on the increased leverage that a tactical unfair labor practice charge may confer; so long as the circuit split remains, this practice will be encouraged. Thus, an employer facing an employment class action may successfully compel arbitration in a state or federal district court, and further successfully defend on appeal the court's order compelling the parties to arbitration. But the NLRB may still pursue that employer in collateral unfair labor practice litigation. *See id.* at **15-26 (Apr. 29, 2016) (ordering employer to reimburse all fees expended by plaintiffs incurred in unsuccessfully opposing employer's motion to compel arbitration, even

[3] Because the NLRB's rules permit charges to be filed by "any person," 29 C.F.R. § 102.9, an attorney representing a group of employees may file such a charge, even if no class members file a charge themselves. *See Labor Ready Sw., Inc., and Jason Kuller, Esq. of Thierman Law Firm, P.C.*, 363 NLRB No. 138, 2016 NLRB LEXIS 159 (Feb. 26, 2016).

though the Ninth Circuit affirmed the agreement's enforceability, and that its opt-out provision rendered it voluntary and not unlawful under the NLRA); *see also Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014).

Moreover, because an appeal of an NLRB decision ordering the reimbursement of attorneys' fees incurred in opposition to a successful motion to compel arbitration may be heard in nearly any circuit, an employer may face inconsistent rulings and punishment for enforcing an arbitration provision that was already found to be enforceable by a different federal circuit court or a state supreme court.

There is no certainty at the outset of unfair labor practice litigation that an appeal of an NLRB order invalidating such an agreement will land in a specific venue. "[A]ny person" who is "aggrieved" by an NLRB order may obtain review of the order in either the circuit in which the unfair labor practice was alleged to have been committed, the circuit wherein such person resides or transacts business, or the Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). Further, even if an employer timely files a petition for review in its home circuit, another petition may be filed in another circuit by another person "aggrieved" by that NLRB order. When these competing petitions for review are filed in different circuits on the same day, the conflict is resolved by the judicial panel on multidistrict litigation selecting a circuit "by means of random selection" and consolidating all other petitions for review of the NLRB's order there. 28 U.S.C.

§ 2112(a)(3); *see also Samsung Elecs. Am., Inc. v. NLRB*, No. 16-60089 (5th Cir. 2016), *consolidated sub nom. Jorgie Franks v. NLRB*, No. 16-10644 (11th Cir. 2016). Such consolidated appeals could easily end up in the Seventh or Ninth Circuits.

As a result, employers across the country – even those who "reside or transact business" outside the Seventh or Ninth Circuits – cannot know whether the lawfulness of their arbitration agreements will be assessed in a jurisdiction that is faithful, or hostile, to such agreements. This uncertainty may well lead employers to assess whether to promulgate, maintain, or enforce arbitration agreements in light of the least-protective jurisdictions, which would further undermine the Congressional policy expressed in the FAA.

We urge this Court to remedy the perverse incentives for gamesmanship and tactical unfair labor practice litigation created by the Seventh Circuit's decision and the attendant deepening circuit split.

CONCLUSION

For the foregoing reasons and for the reasons expressed in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

MARY-CHRISTINE SUNGAILA
Counsel of Record
HAYNES AND BOONE, LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC.Sungaila@haynesboone.com

ALEX R. STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
(214) 651-5475
Alex.Stevens@haynesboone.com

Attorneys for Amicus Curiae International Association of Defense Counsel

ECORD AND BRIEFS

Nos. 16-285 & 16-300

Supreme Court, U.S.
FILED
OCT - 3 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG, LLP, ET AL.,

Petitioners,

v.

STEPHEN MORRIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh and Ninth Circuits

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE COALITION FOR A DEMOCRATIC WORKPLACE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201
(214) 880-8100
eberbarie@littler.com

[Additional Counsel Listed Inside Cover]

LINDA E. KELLY
PATRICK N. FORREST
LELAND P. FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Ste. 1200
Washington, DC 20005

Counsel for the National Retail Federation

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

WILLIAM J. EMANUEL
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 South 8th Street
1300 IDS Center
Minneapolis, MN 55402

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE COALITION FOR A DEMOCRATIC WORKPLACE AND THE NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for three-quarters of private-sector research and development in the nation. NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The Coalition for a Democratic Workplace ("CDW") comprises over 600 organizations representing millions of employers nationwide in nearly every industry. CDW provides a collective voice to its membership on issues related to labor law reform. The

[1] Counsel of record for all parties received timely notice of the intent of amici curiae to file this brief. S. Ct. Rule 37.2(a). The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amici curiae state that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, or their counsel, have made a monetary contribution to this brief's preparation or submission. *See* S. Ct. Rule 37.6

National Retail Federation ("NRF") is the world's largest retail trade association, representing retailers of all types and sizes from across the United States, ranging from the largest department stores to the smallest sole proprietors, including specialty, apparel, discount, online, independent, grocery retailers, and chain and local restaurants and service establishments, among others.

NAM, CDW, and NRF advocate on behalf of their members on a range of matters, including labor and employment issues. They also file briefs as amici curiae in cases of importance, such as these. All three organizations are made up of a vast number of employers with operations across the United States that utilize pre-dispute arbitration agreements with class action waivers[2] in the employment context.

In 2012, the National Labor Relations Board ("NLRB") abandoned the position taken by its former General Counsel as recently as 2010 to find that arbitration agreements with class waivers violate employees' rights to engage in protected, concerted activity under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) ("*D.R. Horton*"); *see also* 29 U.S.C. § 157. Until recently, the NLRB's position had been consistently rejected in courts across the country. Now, deferring to the NLRB and breaking with their

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[2] Amici use the term "class action waiver" or "class waiver" throughout this brief as a short hand way of describing a provision in an arbitration agreement that prohibits class actions under Rule 23 of the Federal Rules of Civil Procedure, collective actions under 29 U.S.C. § 216(b), and any other type of aggregate litigation allowed under federal or state procedure. The purpose of class waivers is to allow parties to engage only in bilateral arbitration.

sister circuits, the U.S. Courts of Appeals for the Seventh and Ninth Circuits have found arbitration agreements with class waivers violate the NLRA. *Lewis v. Epic Systems*, 823 F. 3d 1147 (7th Cir. 2016); *Morris et al. v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. August 22, 2016). The Seventh and Ninth Circuits' decisions disregard this Court's longstanding FAA jurisprudence and also conflict with the precedent of the Fifth, Second and Eighth Circuits. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013); *Cellular Sales of Mo., LLC v. NLRB*, 824 F. 3d 772 (8th Cir. 2016).

Amici curiae have an interest in ensuring that arbitration agreements entered into between employers and employees are enforced according to their terms, as required by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). Amici curiae respectfully submit this brief to emphasize the importance of the issue to employers throughout the country, especially because amici curiae have numerous members with business operations in multiple circuits, and whose arbitration agreements are now enforceable in some jurisdictions but not others. The conflict in the circuits is well-developed and is in need of immediate resolution. The issue is one of serious importance to employers and employees who rely on the benefits of bilateral arbitration in resolving workplace disputes.

SUMMARY OF ARGUMENT

Bilateral arbitration benefits both employees and employers because it offers speed, efficiency and informality. This Court has consistently recognized the advantages of bilateral arbitration—especially in the employment context. Bilateral arbitration agreements commonly contain class action waivers to ensure

greater consistency with respect to the methods of resolution used in disputes.

The prevalence of class waiver provisions makes the circuit split all the more difficult to handle for employers and employees alike, as the enforceability of agreements now depends on venue. Further, the Seventh and Ninth Circuits' injection of the NLRA into an issue governed by the FAA adds to the confusion for two reasons: (1) the NLRA has a broad judicial review provision which can cause inconsistent rulings in parallel proceedings, and (2) the NLRA excludes "supervisors" from its protection, forcing employers to determine which employees are "supervisors" and use different arbitration agreements for those employees. Determining which employees are "supervisors" under the NLRA is a Sisyphean task because of the NLRB's unpredictable positions, opaque tests and results-oriented case law.

The NLRB's inconsistent approach on the class waiver issue compounds this uncertainty and further undermines the NLRB's most recent position and the Seventh and Ninth Circuits' adoption of it. As recently as 2010, the NLRB's former General Counsel advised the NLRB's Regional Directors that "an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver."[3] Less than two years later, the NLRB changed course in *DR Horton* and disregarded the decades of FAA jurisprudence to which it had previously deferred. The Seventh and Ninth Circuits should not have followed the NLRB to upend years of

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[3] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

this Court's FAA precedent, requiring arbitration agreements to be enforced by their terms, based on the NLRB's sudden change in policy. Employers and employees should be able to enforce their contractual commitments to bilateral arbitration. For that reason, amici curiae respectfully request this Court to issue writs of certiorari and reverse the Seventh and Ninth Circuits' decisions.

ARGUMENT

I. CLASS WAIVERS ARE COMMON AND VALUABLE IN THE EMPLOYMENT CONTEXT AND THEIR BENEFITS MUST BE PRESERVED.

FAA-governed arbitration agreements with class waivers are widespread in the American workplace and offer a valuable alternative to class litigation. In 2015 alone, there were 8,954 Fair Labor Standard Act, 29 U.S.C. § 201 *et seq.* ("FLSA") cases filed, many of which were filed as collective actions.[4] A survey of approximately 350 companies[5] shows class actions in the employment context cost those employers approximately $462.8 million in 2014.[6] In addition to the enormous costs involved in defending against class

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[4] *See* Aaron Vehling, *FLSA Class Actions to Hit Record High in 2016*, LAW 360, (Jan. 12, 2016) http://www.law360.com/articles/745603/flsa-class-actions-to-hit-record-high-in-2016.

[5] Survey participants had average annual revenues of 18.2 billion and median annual revenues of $4.6 billion and operate in more than 25 industries, including banking and financial services, consumer goods, energy, high tech, insurance, manufacturing, professional services, and retail trade. *See The 2015 Carlton Fields Jorden Burt Class Action Survey*, available at http://ClassActionSurvey.com, pp. 1 and 37.

[6] *See The 2015 Carlton Fields Jorden Burt Class Action Survey*, p. 7.

claims, there is also "the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). As this Court has recognized, it is no surprise that employers, even when faced with just "a small chance of a devastating loss...will be pressured into settling questionable claims." *Id.*; *see also Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, slip op., at p. 46 (2014) (Johnson, dissenting) ("...[C]laims aggregation poses an increased risk of liability even for meritless claims, due to the simple mathematics of aggregating hundreds or thousands of claims (that would not otherwise exist) into one unitary claim. That aggregated claim will pose a greater risk than any individual claim, regardless of whether it is merited or not.")

Class actions also often fail class members and adversely affect commerce and even the judicial system. When enacting the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, & 1711–1715 ("CAFA"), Congress noted that "abuses of the class action device" have "harmed class members with legitimate claims and defendants that have acted responsibly," "adversely affected interstate commerce," and "undermined public respect for our judicial system." CAFA, Pub. L. No. 109-2, § 2(a)(2), 119 Stat. 4, 4 (2005). Congress also found that, "[c]lass members often receive little or no benefit from class actions, and are sometime harmed," including where "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* at § 2(a)(3).

In response to these well-recognized concerns, FAA-governed arbitration agreements with class waivers

have grown popular in the workplace[7] and provide benefits to employees and employers alike. While class proceedings "make[ ] the process slower, more costly, and more likely to generate procedural morass than final judgment," bilateral arbitration brings "the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. This Court has also specifically recognized the advantages of bilateral arbitration in the employment context. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). As the NLRB's former General Counsel advised, "[i]t should not be overlooked that employers and employees alike may derive significant advantages from arbitrating clams rather than adjudicating them in a court of law."[8]

In sum, FAA-governed arbitration agreements containing class and collective actions waivers are now common in the American workplace and provide valuable benefits to both employers and employees across the country. The importance of preserving bilateral arbitration as an efficient means of resolving workplace disputes cannot be overstated, and this Court should address and preserve the viability of class waivers.

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[7] In 2014, 42.7% of the 350 companies surveyed use arbitration provisions which specifically preclude class actions. *2015 Carlton Fields Jorden Burt Class Action Survey*, p. 26; *see also Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("Indeed, compulsory arbitration agreements are now common in the workplace...").

[8] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

II. THE CURRENT CIRCUIT SPLIT REGARDING THE ENFORCEABILITY OF CLASS WAIVERS IS UNIQUELY CHALLENGING FOR EMPLOYERS.

While a circuit split always presents difficulties for employers with national operations, this split is uniquely challenging. Employers are in a quandary due to the uncertainty of the current state of the law and conflicting precedent.

A. It is unclear whether *any* class waiver will be enforceable until a venue is selected for suit.

It is impossible to know now whether an FAA-governed arbitration agreement with a class waiver, between an employee covered by the NLRA and an employer, will be enforceable until a party selects a venue for a suit. In California, for example, a class waiver would likely be enforced in a California state court, *see Iskanian v. CLS Transp. Los Angeles*, LLC, 59 Cal. 4th 348, 327 P.3d 129 (2014), *cert. denied*, 135 S. Ct. 1155 (2015), but not in a California federal court. *See Morris et al. v. Ernst & Young, LLP*, No. 13-16599 (9th Cir. August 22, 2016).

It is also unclear whether an employee's agreement to waive class claims will be respected, even for employees who live and work in circuits that have upheld class waivers. For example, an employee in Texas could enter into an agreement with her employer to waive class claims. However, if a similarly situated employee were to file a class action suit against the employer in a court in the Seventh Circuit, the employee in Texas could potentially opt-in to an FLSA collective action, or worse yet, become an unwilling participant in a Rule 23 class action, if

she fails to opt-out in a timely manner. The Texas employee's otherwise valid arbitration agreement could be vitiated, merely because a coworker initiated a class action in the Seventh Circuit.

Additionally, due to the NLRA's broad judicial review provision, parties could receive contradictory decisions on the enforceability of the *same* agreement. Consider this hypothetical: if a group of employees covered by the NLRA were to file a class action in a United States District Court in the Seventh Circuit, and an employer were to move to compel individual arbitration based on a class waiver, the U.S. District Court would find the class waiver violates the NLRA and not enforce it. If along with the class action, the employees were to file a charge with the NLRB, the NLRB would likewise find the class waiver violated the NLRA. If the employer conducts business in the Fifth Circuit, however, the employer could challenge the NLRB's determination in that Circuit.[9] The Fifth Circuit would likely find the *exact same agreement between the same parties* lawful, while the U.S. District Court in the Seventh Circuit would find it unlawful under the NLRA.

The circuit split, therefore, calls into question the enforceability of all class waivers entered into with employees covered by the NLRA and makes enforceability a function of venue. This Court must resolve the issue to provide predictability as to the enforceability of these important contracts.

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[9] The NLRA provides an "aggrieved party" the ability to seek review from the circuit where the unfair labor practice occurred, where an employer conducts business or the D.C. Circuit. 29 U.S.C. § 160(f).

B. The NLRB's definition of "supervisors" is unpredictable, rendering it difficult for employers to determine which employees may enter into an agreement with a class waiver.

Complicating matters for employers is the fact that the NLRA's protections do not extend to all employees. The rights granted by the NLRA apply only to "employees" not "supervisors." 29 U.S.C. § 152 (3) & (11). Thus, "supervisors" do not have the right to engage in concerted activity, and there is therefore no basis to find an arbitration agreement with a class waiver between a "supervisor" and employer to be unlawful under the NLRA. While the distinction between supervisors and non-supervisors may be obvious in the workplace, the NLRA, as interpreted by the NLRB, is not. Employees are supervisors under the NLRA if:

> (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in [29 U.S.C. § 152(11)];[10] (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer."

Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006).

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[10] The supervisory functions set forth in 29 U.S.C. § 152(11) include the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.

The Board's gloss on the NLRA's definition can make it exceedingly difficult to determine, much less predict, who is a supervisor under the NLRA. Amorphous phrases such as "the use of independent judgment," "responsibly to direct," "effectively to recommend," and "in the interest of the employer" are notoriously difficult for courts to define, let alone employers who are trying to determine–often at the outset of the employment relationship–who is, and is not, a "supervisor," and who may sign an agreement with a class waiver.[11] This is especially true as a result of the NLRB's often criticized and, at best, inconsistent interpretation of the supervisory test. *See, e.g., NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 716–17 (2001) ("The Board's refusal to apply its limiting interpretation of 'independent judgment'...is particularly troubling because just seven years ago we rejected the Board's interpretation of part three of the supervisory test that similarly was applied."); *NLRB v. Prime Energy Ltd. P'ship*, 224 F.3d 206, 209 (3d. Cir. 2000) ("As the NLRB has evaluated and categorized various jobs in the economy, courts have noted the Board's failure to arrive at a reasonably consistent view of the statutory definition of supervisor."); *Spentonbush/Red Star Cos. V. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in

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[11] In fact, according to the NLRB, there is even a three factor test to determine what "independent judgment" means: (1) the authority to "effect an assignment ... must be independent" and "free from the control of others;" (2) there must be "judgment," meaning formation of an opinion or evaluation by discerning and comparing data; and (3) the "judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Oakwood Healthcare*, 348 NLRB at 692.

this area."); *Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias.'"); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (Posner, J.) ("More important than the verbal niceties in the standard of review is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor.'").

Employers in the Seventh and Ninth Circuits cannot be expected to divine, especially at the outset of the employment relationship, whether the NLRB will classify certain employees as supervisors. This added layer of complexity makes the NLRB's, and now the Seventh and Ninth Circuits' position, in relation to class waivers all the more untenable.

III. THE NLRB SHOULD NOT BE ABLE TO DICTATE WHETHER CLASS WAIVERS IN FAA-GOVERNED ARBITRATION AGREEMENTS ARE ENFORCEABLE.

A mere 18 months before the NLRB's decision in *DR Horton*, the NLRB's former General Counsel issued a memorandum that directly contradicts the NLRB's current position.[12] In the memorandum, the NLRB's General Counsel states "an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in

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[12] Memorandum GC 10-06 from NLRB General Counsel Ronald Meisburg, p. 2 (June 16, 2010).

arbitration."[13] A "*Gilmer* agreement" refers to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), where this Court decided that an "employer could require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims to a private arbitral forum for resolution."[14] The memorandum continues that *Gilmer* and its progeny "should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum, is also in effect waiving his or her individual right to pursue a class action."[15] The memorandum ends with clear instructions for processing charges related to agreements that deny employees the right to file a class action lawsuit: "Employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective action claim without per se violating the Act."[16]

The NLRB's sudden change in course rejects this Court's long-standing FAA jurisprudence. *See, e.g., American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes"). While the NLRB bends its position and agenda to the political winds,[17] courts should not allow these policy shifts to

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[13] *Id.*

[14] *Id.* at p. 5.

[15] *Id.*

[16] *Id.* at p. 7.

[17] *See* Michael C. Harper, JUDICIAL CONTROL OF THE NATIONAL LABOR RELATIONS BOARD'S LAWMAKING IN THE AGE OF *CHEVRON* AND *BRAND X*, 89 B.U. L. Rev. 189-90, 222 (2009) ("Like that of prior Boards, the lawmaking of the President Bush-appointed

upend this Court's precedent upholding the enforceability of bilateral arbitration agreements according to their terms.

Accordingly, review of the Seventh and Ninth Circuits' opinions adopting the NLRB's analysis is necessary, and these cases are the proper vehicles to address the issue presented for review by Petitioners. These cases involve the actual parties to FAA-governed arbitration agreements, advocating for their own legal rights. After all, it is these parties—the real parties in interest—who will have to live with the consequences of any decision by this Court.

CONCLUSION

The Seventh and Ninth Circuits mistakenly followed the lead of the NLRB to disregard this Court's FAA precedent on bilateral arbitration agreements. The resulting circuit split is unusually burdensome and unpredictable. Under the current state of the law, the enforceability of an FAA-governed arbitration agreement with a class waiver depends largely on the venue where the parties seek to enforce the agreement. And the NLRA's judicial review provisions, as well as the challenge of defining who is a "supervisor," increase the confusion caused by the split. To remedy

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National Labor Relations Board has generated criticism and controversy. Although some of the criticism has been directed at the substance of the law and policy made by the Board, much of it has highlighted the extent to which the Bush-appointed Board has overturned prior decisions, thereby unsettling reliance on Board doctrine and respect for the Board as an expert administrative agency at least somewhat insulated from political shifts. This critique of excessive policy oscillation echoes criticism of earlier Boards...").

these issues, amici curiae respectfully request the petitions for writs of certiorari be granted.

Respectfully submitted,

LINDA E. KELLY
PATRICK N. FORREST
LELAND P. FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

MALLORY DUNCAN
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Ste. 1200
Washington, DC 20005

Counsel for the National Retail Federation

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue,
Suite 1500, Lock Box 116
Dallas, Texas 75201
(214) 880-8100
eberbarie@littler.com

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

WILLIAM J. EMANUEL
LITTLER MENDELSON, P.C.
2049 Century Park East
5th Floor
Los Angeles, CA 90067

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

NOAH G. LIPSCHULTZ
LITTLER MENDELSON, P.C.
80 South 8th Street
1300 IDS Center
Minneapolis, MN 55402

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT - 3 2016
OFFICE OF THE CLERK

No. 16-285

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

October 3, 2016

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether certiorari should be granted to decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, 29 U.S.C. § 157, which protects an employee's right "to engage in concerted activities for . . . mutual aid or protection."[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's proposed amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.2(a), NELF states that it has provided counsel for both parties with timely written notice of NELF's intent to file this brief, and that counsel for both parties have filed with the Court a blanket letter of consent to the filing of amicus briefs in this case.

NELF is committed to upholding the FAA's mandate to enforce class and collective action waiver contained in valid arbitration agreements. This serves the FAA's purpose to allow parties to fashion a streamlined arbitral process for the speedy private resolution of disputes. NELF is also committed to upholding the FAA's mandate with respect to the arbitration of federal statutory claims, unless that statute provides a "contrary congressional command" that clearly overrides the FAA's mandate to enforce such waivers. When the federal statute at issue fails to displace the FAA's mandate, here by failing to provide for a nonwaivable right to pursue group legal action, the FAA requires courts to enforce the disputed class and collective arbitration waiver according to its terms.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether to grant certiorari in this case.

SUMMARY OF ARGUMENT

This Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

contained in employment arbitration agreements. To escape his contractual obligation to arbitrate disputes on an individual basis only, the respondent, Jacob Lewis, would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. But the NLRA contains no such contrary congressional command. The statute makes no mention of class actions and was enacted decades before the advent of the modern class action. Nor does the NLRA mention collective actions or even provide for an *individual* right of action. Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

The NLRA's "right . . . to engage in . . . concerted activities for . . . mutual aid or protection" lacks the specificity and directness that this Court has required for a federal statute to override the FAA's mandate to enforce arbitration agreements according to their terms. Under *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012), a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

As with the Credit Repair Organization Act ("CROA") under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the disputed terms of an arbitration agreement. At

issue in *CompuCredit* was whether the CROA overrode a contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed contractual term. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both CROA and NLRA claims. Accordingly, Lewis' class and collective action waiver should be enforced.

This is confirmed by the NLRA's statement of purpose, which makes no mention of legal action of any kind. To the contrary, the NLRA was expressly intended to avoid "industrial strife" through the "friendly adjustment of industrial disputes," 29 U.S.C. § 151, by protecting the employee's right to self-organization in order to negotiate on an equal footing with the employer over the terms and conditions of employment. This clear purpose of achieving industrial peace through negotiated compromise is incompatible with the *coercive* aims of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer.

The Seventh Circuit's reliance on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), is entirely misplaced. *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or

protection" under the NLRA if they acted outside of the immediate employer-employee relationship, by taking political action with respect to work-related issues.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI AND DECIDE THAT THE NATIONAL LABOR RELATIONS ACT DOES NOT DISPLACE THE FEDERAL ARBITRATION ACT'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

At issue is whether this Court should grant certiorari and decide whether, in the case of an employment arbitration agreement that precludes class and collective actions, the mandate to enforce such an agreement under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), is overridden by § 7 of the National Labor Relations Act, which protects an employee's right "to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157.[3]

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[3] Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

The Seventh Circuit in this case, along with the Ninth Circuit in a case that is also before this Court on a petition for certiorari,[4] has held that the NLRA overrides the FAA by providing employees with a nonwaivable right to pursue group legal action against their employer. The Fifth Circuit, however, has held to the contrary, in a case that is *also* before the Court on a petition for certiorari.[5] Accordingly, certiorari should be granted to resolve the split of authority on this important issue of federal law.

A. Nowhere Does The NLRA State That Employees Have The Nonwaivable Right To Pursue Group Legal Action Against Their Employer.

The Court should grant certiorari and decide that the NLRA does not displace the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. "[C]ourts must rigorously enforce arbitration agreements according to their terms, . . . including terms that specify [how] . . . the parties choose to arbitrate their disputes," such as by restricting arbitration to individual claims only. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations and internal quotation marks omitted). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S.

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[4] *Morris v. Ernst & Young, LLP*, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. filed* (Sept. 8, 2016) (No. 16-300).

[5] *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (Sept. 9, 2016) (No. 16-307).

333, 344 (2011) ("Requiring the availability of classwide arbitration [by invalidating a class action waiver] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (199.) (FAA requires enforcement of agreement to arbitrate employment claims under ADEA).

To escape his contractual obligation to arbitrate disputes on an individual basis only, Lewis would have to show that the NLRA announces a "contrary congressional command" that employees have the nonwaivable right to pursue group legal action against their employer. *See Italian Colors*, 133 S. Ct. at 2309. (FAA's mandate "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'") (citations and internal quotation marks omitted) (quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). *See also Gilmer*, 500 U.S. at 26 ("[T]he burden is on [the employee] to show that Congress intended to preclude a waiver of a [class or collective legal action] for [NLRA] claims.").

But the NLRA contains no such contrary congressional command that guarantees an employee the right to pursue group legal action against his or her employer. As with the Sherman and Clayton Acts under review in *Italian Colors*, the NLRA, enacted in 1935, "make[s] no mention of class actions" and was "enacted decades before the advent [in 1966] of Federal Rule of Civil Procedure 23 . . . ." *Italian Colors*, 133 S. Ct. at 2309.

Nor does the NLRA provide that employees have the right to seek a collective action, or even an *individual* action, against their employer. Instead, Congress saw fit to delegate exclusive enforcement powers to the NLRB to prosecute claims of unfair labor practices.[6] Congress could not have intended to provide employees with nonwaivable procedural rights associated with a nonexistent right of action.

Nor, for that matter, does the NLRA even mention arbitration agreements. *See CompuCredit*, 132 S. Ct. at 672 (only federal statutes making express reference to arbitration agreements can override FAA's mandate to arbitrate disputes covered by such agreements). In short, Congress has not "evinced an intention [in the NLRA] to preclude a waiver of" class or collective procedures. *Gilmer*, 500 U.S. at 26. Therefore, the FAA should require Lewis to comply with his contractual obligation to arbitrate his disputes on an individual basis only.

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[6] *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . .").

B. An Employee's NLRA Right "To Engage In . . . Concerted Activities For . . . Mutual Aid Or Protection" Falls Far Short Of The Specificity And Directness Required Under *CompuCredit v. Greenwood* To Override The FAA's Mandate.

To be sure, the NLRA provides employees with "the right . . . to engage in . . . concerted activities for . . . mutual aid or protection . . . ." 29 U.S.C. § 157. But this "concerted activities" language lacks the specificity and directness that this Court has required for a federal statute to supplant the FAA's mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 670 (Credit Repair Organization Act, 15 U.S.C. §§ 1679-1679j ("CROA"), does not displace FAA's mandate, even though CROA provides right to judicial remedy and bars waiver of statutory rights).

At issue in *CompuCredit* was whether the CROA provided a nonwaivable right to sue in federal court in the first instance, thereby overriding the FAA's mandate to enforce an agreement to arbitrate such claims. *See CompuCredit*, 132 S. Ct. at 668-671. The Court held that the CROA did not do so, even though it did provide a private right of judicial action and did bar the waiver of rights under that statute. *See id.* at 669. The Court concluded that "[b]ecause the CROA is *silent* on whether claims under the Act can proceed in an arbitrable forum, . . . the FAA requires the arbitration agreement to be

enforced according to its terms." *Id.* at 673 (emphasis added).

In short, *CompuCredit* teaches that a contrary congressional command should announce itself clearly on the face of a statute. Such an intent should not be "found" in the interstices of a statute, and certainly not by engaging in a strained interpretation of the statutory language "concerted activities."

Notably, the only federal statutes that the Court in *CompuCredit* identified as announcing a contrary congressional command made *express* reference to predispute arbitration agreements:

> When [Congress] has restricted the use of arbitration in other contexts, it has done so with *a clarity that far exceeds the claimed indications* in the CROA. *See, e.g.*, 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) ("*No predispute arbitration agreement* shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); 15 U.S.C. § 1226(a)(2) (2006 ed.) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for *the use of arbitration* to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all

> parties to such controversy consent in writing to use arbitration to settle such controversy"); *cf.* 12 U.S.C. § 5518(b) (2006 ed., Supp. IV) [Dodd-Frank Act] (granting authority to the newly created Consumer Financial Protection Bureau to regulate *predispute arbitration agreements* in contracts for consumer financial products or services).

CompuCredit, 132 S. Ct. at 672 (emphasis added).

By contrast, the NLRA's clipped and general "concerted activities" language falls far short of these statutory examples discussed in *CompuCredit* because the language does *not* state that employees have a nonwaivable right to pursue group legal action against their employer. Only such precise and direct statutory language could satisfy *CompuCredit*.

As with the CROA under review in *CompuCredit*, the NLRA is also silent on the issue of invalidating the terms of an arbitration agreement. At issue in *CompuCredit* was whether the CROA overrode the contractual term to submit claims to binding arbitration. At issue here is whether the NLRA overrides the contractual term to arbitrate all employment-related disputes on an individual basis only. In both cases, the federal statute at issue says nothing about the enforceability of the disputed term in the arbitration agreement. Therefore, the FAA's mandate to enforce the arbitration agreement according to its terms remains undisturbed for both

CROA and NLRA claims. Accordingly, Lewis' class and collective action waiver should be enforced.

C. The NLRA's Statement Of Purpose Further Defeats Any Congressional Intent To Provide Employees With The Nonwaivable Right To Pursue Group Legal Action.

As with the other NLRA sections discussed above, the NLRA's statement of purpose makes no mention of an employee's right to pursue group (or even individual) legal action against his or her employer. In fact, the statement of purpose appears to be antithetical to coercive legal action of any kind, let alone endorse "the risk of 'in terrorem' settlements that class actions entail . . . ." *Concepcion*, 563 U.S. at 350.

In particular, the NLRA's stated purpose is to avoid "industrial strife" (such as strikes and employer lock-outs) by encouraging the "*friendly adjustment* of industrial disputes" through "collective *bargaining*," and "by restoring equality of *bargaining* power between employers and employees . . . for the purpose of *negotiating* the terms and conditions of their employment . . . ." 29 U.S.C. § 151 ("Findings and declaration of policy") (emphasis added).

Clearly, the NLRA's purpose is "to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the *mediatory influence of negotiation*." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211

(1964) (emphasis added). This clear statutory purpose of achieving industrial peace through negotiated compromise would be incompatible with the coercive thrust of a class or collective legal action, with its attendant threat of exacting an "in terrorem" settlement from the employer, regardless of the merits of the dispute.

In sum, the NLRA does not evince a congressional intent to override, or even address, the FAA's mandate to enforce class and collective action waivers contained in employment arbitration agreements. Certiorari should therefore be granted to uphold the FAA's mandate to enforce those agreements according to their terms.

II. THE COURT'S DECISION IN *EASTEX v. NLRB* PROVIDES NO SUPPORT FOR THE SEVENTH CIRCUIT'S OPINION.

The Seventh Circuit has relied extensively on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), to support its conclusion that the NLRA protects an employee's right to pursue group legal action against his or her employer. *See* Petition for Certiorari, Appendix A, 4a, 10a, 21a. But the lower court's reliance on *Eastex* is entirely misplaced.

Unlike this case, *Eastex* did not involve any judicial action taken by employees, did not involve the FAA, and did not even interpret the NLRA's "concerted activities" language. Instead, that case decided the entirely unrelated issue whether employees acted "for mutual aid or protection" under § 7 of the NLRA if they acted outside of the immediate employer-employee relationship, by

engaging in political efforts to influence state and federal governmental action on work-related issues.[7]

To be sure, the Court in *Eastex* acknowledged, in passing, that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Eastex*, 437 U.S. at 566. But this is merely *dictum* to the Court's holding that the "mutual aid or protection" clause can extend beyond the workplace to include the proposed political activity discussed in the union newsletter at issue.[8] Moreover, none of the NLRB decisions that the Court cited for this proposition

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[7] In *Eastex*, employees sought to distribute a union newsletter on the employer's property that, among other things, urged employees to write their state legislators to voice their opposition to efforts to incorporate the state "right-to-work" statute into the state constitution, and to take political action against the President's veto of a bill to increase the federal minimum wage. *Eastex*, 437 U.S. at 559-60. The employer refused to allow employees to distribute the newsletter. *See id.* at 560-61. The employer argued that the proposed political action discussed in the newsletter would not be protected under the NLRA's "mutual aid or protection" clause because employees would be acting "through channels outside the immediate employee-employer relationship." *Id.* at 565. The Court rejected the employer's position and held that the "mutual aid or protection" clause could apply to employees' actions taken outside the workplace. *Id.* at 565-67. The Court then proceeded to review and approve the NLRB's findings in that case that the proposed political activity in the union newsletter would be protected by the "mutual aid or protection" clause. *Id.* at 569-70.

[8] *See* n.7, above.

involved a class or collective action. *See id.*, 437 U.S. at 566 n.15.

And finally, the Court in *Eastex* emphasized that "[w]e do not address here the question of what may constitute 'concerted' activities in th[e] context" of administrative or judicial forums. *Id.* *See also Morris v. Ernst & Young*, 2016 WL 4433080, at *15 n.5 (9th Cir. Aug. 22, 2016) (Ikuta, J., dissenting) (discussing same). That is, the Court in *Eastex* declined, even in *dictum*, to address the very issue presented in this case--whether the NLRA's "concerted activities" language protects the particular procedural form of an employee's judicial action.

In short, *Eastex* provides no support for the Seventh Circuit's opinion, and certiorari should therefore be granted to reverse the lower court and enforce the FAA's mandate in employment arbitration agreements.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioner's petition for certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

October 3, 2016

RECORD
AND
BRIEFS

No. 16-285

In the
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Epic Systems, Inc.[1] Founded over 40 years ago, PLF litigates matters affecting the public interest at all levels of state and federal court, representing the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving contractual arbitration and class actions in both the consumer and employment context. *See, e.g.*, *ABM Indus., Inc. v. Castro*, No. 15-1427 (pending); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *D.R. Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013); and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

In April, 2014, Jacob Lewis, a technical writer for Epic Systems, agreed to arbitrate wage-and-hour claims on an individual basis, specifically waiving "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Lewis v. Epic Systems Corporation*, 823 F.3d 1147, 1151 (7th Cir. 2016). In February, 2015, Lewis sued Epic in federal district court for alleged violations of the Fair Labor Standards Act. He sued on behalf of himself and the other technical writers, alleging they were misclassified as exempt employees and thereby deprived of overtime pay. Epic moved to dismiss based on the arbitration agreement and class-action waiver. *Id.*

The district court agreed with Lewis that mandatory individual arbitration violated the employees' right under the National Labor Relations Act (NLRA) to engage in concerted activities for mutual aid and protection. *See* 29 U.S.C. § 157. The Seventh Circuit affirmed on the grounds that the "concerted activities" statute controls and the Federal Arbitration Act (FAA) simply does not apply and therefore creates no conflict with the NLRA. *Lewis*, 823 F.3d at 1157.

This Court should grant the petition for a writ of certiorari because: (1) the decision below deepens an acknowledged and fracturing split among the circuit courts, both as to the interpretation of the NLRA, *id.* at 1155, and as to its holding that the FAA does not apply to mandatory arbitration within the employment context, *id.* at 1157-58, and (2) the Seventh Circuit opinion affects more businesses than those present

within its geographical boundaries because it reinforces the National Labor Relations Board's policy of nonacquiescence, which impels it to bring enforcement actions against companies nationwide on this issue, even in circuits that respect class-action waivers. *See Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I

THERE IS AN IRRECONCILABLE AND GROWING CONFLICT AMONG THE CIRCUITS

Until just six months ago, every one of the federal circuit courts and state supreme courts that considered the effect of the NLRA's "concerted activities" provision on FAA-protected arbitration contracts came to the same conclusion: This Court's decisions in *AT&T Mobility v. Concepcion*, 563 U.S. at 346, and *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), which applied both the FAA and federal substantive law of arbitration, affirmed the validity of class action waivers in the employment context. *See D.R. Horton*, 737 F.3d at 360 ("[T]here is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA."); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) ("Cellular Sales did not violate section 8(a)(1) [of the NLRA] by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes.");

Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297-98 & n.8 (2d Cir. 2013) (neither the Fair Labor Standards Act nor the NLRA overrides the FAA's enforcement of arbitration agreements); *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th at 372 ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting such waivers."); *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015) ("[I]nvalidation of class arbitration waivers cannot be reconciled with the FAA as authoritatively interpreted by the Supreme Court in *Concepcion* and *Italian Colors*.").

Since then, however, both the Seventh and Ninth Circuit courts have held to the contrary—invalidating otherwise valid arbitration agreements solely because they allegedly infringe upon employees' rights to engage in concerted activities under the NLRA. *See Lewis*, 823 F.3d 1147; *Morris v. Ernst & Young, LLP*, ___ F.3d ___, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for writ of certiorari filed* Sept. 8, 2016 (No. 16-300).[2] In part, these decisions were based on a deferential adoption of the National Labor Relations Board's position that arbitration agreements cannot require an employee to forego class resolution of work-related claims.

The effect of this split in the circuits is particularly confusing because the NLRB takes the position—despite the conflict in the circuits—that its own agency decision in *D.R. Horton* "remains controlling Board law" nationwide until such time as

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[2] Because the question presented in Ernst & Young's petition is equivalent to that presented in Epic Systems' petition, amicus Pacific Legal Foundation urges this Court to grant certiorari in both cases.

this Court overturns it. *See 20/20 Communications, Inc. and Charlie Smith*, 2016 WL 4651564 (N.L.R.B. Div. of Judges Sept. 6, 2016) (citing *Manor West, Inc.*, 311 NLRB 655, 667 n.43 (1993)). This matter must be resolved.

II

THE QUESTION PRESENTED IS OF NATIONAL IMPORTANCE AS TO THE FREEDOM OF CONTRACT IN THE EMPLOYMENT CONTEXT

While federal law places some substantive limits on the ability of adults to freely contract to arrange their affairs, courts generally respect people's rights to determine the procedures by which they will resolve their disputes. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) ("One of the fundamental policies" underlying the NLRA is "freedom of contract."). A key issue presented by this case is whether Section 7 creates a substantive, non-waivable right to pursue claims unrelated to the NLRA on a class basis.

A. This Court Should Grant Review To Affirm That Aggregate Litigation Is a Matter of Procedure, Not Substance

The FAA provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act also "mandates that district courts '*shall*' direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). Accordingly, "agreements to arbitrate must be enforced, absent a ground for revocation of the

contractual agreement." *Id.* The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. In this case, it is the NLRB's hostility to individual arbitration that has only recently enjoyed refuge in two circuit courts.

Current law considers collective litigation, however styled, to be a matter of procedure, not a substantive right. This Court held in *Italian Colors* that the antitrust laws and Federal Rule of Civil Procedure 23 do not counteract the procedural choices made by parties in arbitration contracts. 133 S. Ct. at 2310. *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) ("Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right.").

This Court held in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination

prohibited by federal law."); *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In short, plaintiffs do not give up their substantive rights under the federal laws by being required to arbitrate their dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). By agreeing to arbitrate disputes, plaintiffs agree to substitute one forum for another; they "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*

Moreover, the Board's position, accepted by the court below, that an employee's agreement to pursue employment disputes on an individual basis violates a core purpose of the NLRA, cannot be reconciled with the Board's acceptance of arbitration encompassed within collective bargaining agreements. *See, e.g., Olin Corp.*, 268 N.L.R.B. 573, 577 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955)"' (After collectively bargained-for arbitration, Board defers to arbitrators' awards, even when it would have decided the underlying statutory issue differently.); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 48 (2011). The Board's differing approach to arbitration when agreed to by unions versus individuals cannot stand. This Court has routinely allowed and enforced waivers of the right to strike, which waive employees' rights to engage in concerted activity, where the "no-strike" clause was part of a freely negotiated collective bargaining agreement. *Textile Workers Union of Am. v. Lincoln*

Mills of Ala., 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238-39 (1970) (exclusive bargaining representative may waive Section 7 rights of the employees it represents in exchange for other concessions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956) (same). This Court even implied an agreement not to strike where a collective bargaining agreement contains an arbitration provision. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

While this Court has expressly held arbitration to be procedural in nature in many contexts, it has not yet done so in the context of individual workplace disputes that arguably implicate provisions of the NLRA.[3] The Court should grant the petition in this case to ensure that employees and employers retain the right to arbitrate their workplace disputes.

B. This Case Arises in the Nationally Important Context of Circuit Court Deference to Agency Nonacquiescence

Nonacquiescence refers to the "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). The NLRB, "more than most [agencies], has openly asserted the authority to decline to acquiesce." *Id.* at 706. The

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[3] Pacific Legal Foundation disagrees that Lewis's claims in this case implicate the "concerted action" provision of the NLRA.

Board is committed to pressing its own view of the law until the Board itself or this Court overrules it; it claims that piecemeal acceptance of particular circuits' interpretations of the law would frustrate its development of a national labor policy. *Id.* at 706 (citing *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957)). The Board's sole nod to the rule of law established by federal courts is with regard to an appellate court's "treatment of a particular case on remand." *Id.* at 706 n.148.

Decisions by federal courts hold no sway over the NLRB and its administrative law judges (ALJs) in light of the NLRB's "policy of non-acquiescence" that instructs ALJs to follow Board precedent rather than the precedent of courts of appeals. *See, e.g.*, *Murphy Oil USA v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) ("We do not celebrate the Board's failure to follow our D.R. Horton reasoning, but neither do we condemn its nonacquiescence."); *Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO v. NLRB*, 491 F.3d 429, 435 (D.C. Cir. 2007) (NLRB refuses even to recognize the existence of circuit court decisions contrary to its own policies.).

Other agencies may invoke a policy of nonacquiescence as well. For example, like the NLRA, the Immigration and Naturalization Act provides for appellate review in such a way that Immigration Judges cannot know for certain which court of appeals will review their decisions. *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1093-94 (7th Cir. 1994). In *Rosendo-Ramirez*, the Immigration and Naturalization Service (INS), urged the Seventh Circuit to apply the law of the Fifth Circuit, which adopted the INS's position, while disregarding the Seventh Circuit's own decision

in *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993), which rejected the INS's position. The *Rosendo-Ramirez* court interpreted INS's argument as "an inartful (or maybe in fact cleverly disguised) attempt at nonacquiescence to [the] rule in *Leal-Rodriguez*." *Id.* at 1083. The court declined to adopt the INS's proposal.

District of Columbia Circuit Chief Judge Abner Mikva decried the United States Railroad Retirement Board's policy of nonacquiescence that led it to deny benefits to the spouses and widows of railroad workers even after multiple appellate courts held that denial to be unlawful. *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1083 (D.C. Cir. 1992) ("In a bold challenge to judicial authority, the United States Railroad Retirement Board argues that it is free, when it chooses, to ignore the decisions of United States courts of appeals."). As in this case, the Retirement Board declined to petition this Court for review of adverse circuit court rulings while continuing to apply the rejected interpretation of its controlling statute. *Id.* at 1087. *See also id.* at 1092 ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The Railroad Retirement Board has done neither.").[4] Also similar to this case, the Board—and here, the decision below (Pet. App. 7a)—applied *Chevron* deference to the agency interpretation. The *Johnson* court held that *Chevron*

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[4] Only subsequent to the filing of the petition in this case and in the *Ernst & Young* case did the NLRB file a petition for writ of certiorari seeking review of the Fifth Circuit's ruling adverse to its position. *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307 (petition filed Sept. 9, 2016).

deference does not apply because the Board was "not interpreting its governing statute alone, but rather the relationship between" the governing statute and another federal statute (the Social Security Act). *Id.* at 1088. Moreover, a policy of nonacquiescence creates an inherently non-uniform application of the law because it "results in very different treatment for those who seek and who do not seek judicial review." *Id.* at 1092. *See also Ruppert v. Bowen*, 871 F.2d 1172, 1178 (2d Cir. 1989) (noting the Social Security Administration's "history of uncooperativeness" in its failure to follow circuit court decisions); *cf. Atchison, Topeka and Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (without Supreme Court review, "nonacquiescence may yield entrenched differences among the circuits") (Easterbrook, J., concurring).

The Environmental Protection Agency (EPA) also issued a directive adhering to a judicially-invalidated interpretation of the Clean Air Act. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The case involved an EPA regulation broadly defining what constitutes a "major" source of pollution. *Id.* at 1002. The Sixth Circuit, in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012), held that the EPA's definition was "arbitrary and capricious" and then denied the EPA's petition for rehearing. The EPA continued to apply its own definition everywhere outside the Sixth Circuit. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1003. The D.C. Circuit found "no merit in EPA's arguments" and struck down the directive to ignore *Summit*. *Id.* at 1004, 1011 ("The doctrine of intercircuit nonaquiescence does not allow EPA to ignore the plain language of its own regulations" that require uniformity.) *See also id.* at 1010 (EPA could have

petitioned this Court to review *Summit* but failed to do so). EPA responded to the D.C. Circuit opinion by amending its regulations to provide an exception to the uniformity requirement and "fully accommodate intercircuit nonacquiescence." *Amendments to Regional Consistency Regulations*, 81 F.R. 51102-01, 51103, 2016 WL 4089445 (Aug. 3, 2016).

By granting the petition in this case, this Court need not determine whether agency policies of nonacquiescence are constitutional in all their varieties. *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1351 (1991) (intracircuit nonacquiescence vulnerable to separation of powers, due process, and equal protection challenges). However, the NLRB's policy of nonacquiescence provides an important context to the question presented and this Court's consideration of that context will guide circuit courts and administrative agencies when other agency-court conflicts arise.

CONCLUSION

The National Labor Relations Board "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Only this Court can settle the important question of whether the NLRA's protection of "concerted action" eliminates the freedom of employers and employees to contract for arbitral resolution of workplace disputes, as guaranteed by the Federal Arbitration Act.

The petition for a writ of certiorari should be granted.

DATED: September, 2016.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

RECORD
AND
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FILED
JUN - 9 2017
OFFICE OF THE CLERK

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On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth and Seventh Circuits

BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Counsel for Epic Systems Corporation

JEFFREY A. SCHWARTZ
JACKSON LEWIS P.C.
1155 Peachtree Street, NE
Suite 1000
Atlanta, GA 30309

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

Counsel for Murphy Oil USA, Inc.

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

PARTIES TO THE PROCEEDINGS

1. In No. 16-285, petitioner Epic Systems Corporation was the defendant-appellant in the Seventh Circuit.

Respondent Jacob Lewis was the plaintiff-appellee in the Seventh Circuit.

2. In No. 16-307, petitioner National Labor Relations Board was the respondent/cross-petitioner in the Fifth Circuit.

Respondent Murphy Oil USA, Inc., was the petitioner/cross-respondent in the Fifth Circuit.

Respondent Sheila M. Hobson was the charging party before the Board and an intervenor in the Fifth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Epic Systems Corporation has no parent corporation, and no publicly held company owns 10% or more of Epic Systems Corporation's stock.

Murphy Oil USA, Inc.'s parent company is Murphy USA, Inc. Murphy USA, Inc., is the only publicly held company that owns 10% or more of Murphy Oil USA, Inc.'s stock.

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IN THE

Supreme Court of the United States

Nos. 16-285 & 16-307

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,

Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth and Seventh Circuits

BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

INTRODUCTION

Employers and employees often enter into employment contracts providing for the arbitration of any disputes. And the arbitration provisions in those contracts often include waivers of class or collective proceedings (referred to here as "class waivers"),

requiring that claims be resolved on an individual basis.

It is not hard to understand why. As this Court has recognized, there are "real benefits" to arbitration, and those benefits do not "somehow disappear" in "the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-123 (2001). In fact, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation." *Id.* at 123. Yet class or collective proceedings ("class proceedings," for short) would "sacrifice[]" arbitration's "principal" benefits by "mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT & T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). To preserve the "fundamental attributes of arbitration," then, employers and employees often agree to class waivers. *Id.* at 344.

The question in these consolidated cases is whether those class waivers are enforceable. The answer is yes. The Federal Arbitration Act (FAA) unambiguously mandates their enforcement, and the National Labor Relations Act (NLRA) contains no contrary congressional command. Rather, the NLRA can be reasonably construed as consistent with the FAA's unambiguous mandate, so the Court should adopt that construction to harmonize the two statutes.

The upshot is that the advantages of arbitration need not be sacrificed in the employment context. Like other contracts, employment contracts may require that arbitration be conducted on an individual basis.

OPINIONS BELOW

In No. 16-285 (*Epic*), the opinion of the United States Court of Appeals for the Seventh Circuit is reported at 823 F.3d 1147. *Epic* Pet. App. 1a-23a. The District Court's opinion denying Epic Systems Corporation's motion to dismiss and compel individual arbitration is not published in the *Federal Supplement*, but it is available at 2015 WL 5330300. *Epic* Pet. App. 24a-29a.

In No. 16-307 (*Murphy Oil*), the opinion of the United States Court of Appeals for the Fifth Circuit is reported at 808 F.3d 1013. *Murphy Oil* Pet. App. 1a-16a. The National Labor Relations Board's decision and order are reported at 361 N.L.R.B. No. 72. *Murphy Oil* Pet. App. 17a-212a.

JURISDICTION

In *Epic*, the Seventh Circuit entered judgment on May 26, 2016. *Epic* Pet. App. 1a. On July 29, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 23, 2016, and the petition was filed on September 2, 2016.

In *Murphy Oil*, the Fifth Circuit entered judgment on February 18, 2016. *Murphy Oil* Pet. App. 215a. It then denied the Board's petition for rehearing en banc on May 13, 2016. *Id.* at 213a. On August 10, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 9, 2016, and the petition was filed on that date.

On January 13, 2017, this Court granted the petitions in *Epic*, *Murphy Oil*, and *Ernst & Young LLP* v.

Morris, No. 16-300, and consolidated the three cases. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an addendum to this brief. Add. 1a-17a.

STATEMENT

A. *Murphy Oil*

1. Murphy Oil USA, Inc., operates retail gas stations in 26 States throughout the country. In 2008, Sheila Hobson entered into an arbitration agreement with Murphy Oil when she applied to work at a gas station in Calera, Alabama. *Murphy Oil* Pet. App. 2a, 26a. Hobson eventually got the job and was employed by Murphy Oil until September 2010. *Id.* at 26a.

By signing the agreement, Hobson "agree[d] to resolve any and all disputes or claims *** which relate *** to [her] employment *** by binding arbitration." J.A. 8. She "waive[d] the[] right to commence or be a party to any group, class or collective action claim in arbitration or any other forum." J.A. 11. And she agreed that "any claim by or against [her] or [Murphy Oil] shall be heard without consolidation of such claim with any other person or entity's claim." *Id.*

2. In June 2010, Hobson and three other employees brought a collective action against Murphy Oil under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, alleging that they had been denied compensation for overtime and other work-related activities. J.A. 14, 23-24. Murphy Oil moved to compel individual arbitration, as provided in the agreement signed by Hobson and the other employ-

ees. *Murphy Oil* Pet. App. 2a-3a. The District Court granted that motion and entered a stay pending arbitration. *Id.* at 4a. After the employees failed to submit their claims to arbitration, however, the District Court dismissed the case with prejudice in July 2015. *Id.* at 4a n.1.

3. In a separate proceeding, Hobson filed a charge with the National Labor Relations Board in January 2011. *Id.* at 3a. Two months later, the Board's then-Acting General Counsel issued a complaint asserting that Murphy Oil had committed an unfair labor practice under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an arbitration agreement that interfered with an employee's right under Section 7 of the same statute to engage in "concerted activities," *id.* § 157. *See Murphy Oil* Pet. App. 27a.

While the proceeding against Murphy Oil was pending, the Board issued its decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). There, the Board concluded that an arbitration agreement containing a class waiver "unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes employment-related arbitration agreements judicially enforceable." *Id.* On review, the Fifth Circuit disagreed, explaining that such an agreement "must be enforced according to its terms" because the NLRA does not "contain a congressional command overriding application of the FAA." *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 362 (5th Cir. 2013).

Undeterred by the Fifth Circuit's ruling, the Board reaffirmed its own *D.R. Horton* decision in October 2014 and concluded that Murphy Oil had violated

the NLRA by "requiring its employees to agree to resolve all employment-related claims through individual arbitration." *Murphy Oil* Pet. App. 22a-23a. Two of the five Board members dissented. *Id.* at 89a-208a.

4. Murphy Oil petitioned for review in the Fifth Circuit. *See* 29 U.S.C. § 160(f). The court granted the petition in relevant part, holding that Murphy Oil had not committed any unfair labor practice by maintaining and enforcing its arbitration agreement. *Murphy Oil* Pet. App. 2a. Given that the Fifth Circuit had decided the same issue in *D.R. Horton*, the court saw no need to "repeat its analysis." *Id.* at 8a. The court subsequently denied rehearing en banc. *Id.* at 213a-214a.

B. *Epic*

1. Epic Systems Corporation is a Wisconsin-based company that makes software for recording, organizing, and sharing healthcare data. Hospitals, academic medical facilities, retail clinics, safety-net providers, and other healthcare organizations use Epic's software every day across the country. Epic relies on its own employees to develop, install, and support its software.

In April 2014, Epic sent an email containing an arbitration agreement to many of its employees. *Epic* Pet. App. 2a. A day after receiving the email, Jacob Lewis, who was then a technical communications employee, responded by acknowledging that he understood and consented to the terms of the arbitration agreement. *Id.* In doing so, Lewis "agree[d] to use binding arbitration, instead of going to court, for any 'covered claims'"—a category that included any "claimed violation of wage-and-hour practices or

procedures under local, state or federal statutory or common law." *Id.* at 30a-31a.

The arbitration agreement also contained a "Waiver of Class and Collective Claims." *Id.* at 31a. By accepting that waiver, Lewis "agree[d] that covered claims will be arbitrated only on an individual basis," and "waive[d] the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* The agreement further provided that "if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction." *Id.* at 35a.

2. Lewis continued to work for Epic until December 2014. App. to Epic C.A. Br. 9. Then, in February 2015, Lewis sued Epic in federal court on behalf of a putative class and collective of certain technical communications employees, claiming that they had been denied overtime wages in violation of the FLSA and Wisconsin law. *Epic* Pet. App. 2a.

Epic moved to dismiss the complaint and compel individual arbitration, citing its arbitration agreement with Lewis. *Id.* Although Lewis acknowledged that his claims fell within the scope of that agreement, the District Court denied Epic's motion. *Id.* at 24a, 29a. According to the District Court, the class waiver was unenforceable because it violated an employee's right to engage in "concerted activities" under Section 7 of the NLRA. *Id.* at 25a-28a.

3. The Seventh Circuit affirmed. *See* 9 U.S.C. § 16(a); *Epic* Pet. App. 2a. Turning first to the NLRA, the court held that a "collective, representative, or class legal proceeding is *** a 'concerted

activit[y]'" under Section 7, *Epic* Pet. App. 10a (brackets in original), and that the class waiver interfered with Lewis's "substantive" Section 7 right to concerted activity, in violation of Section 8(a)(1). *Id.* at 9a-12a. The court then turned to the FAA, holding that it does not require enforcement of an arbitration provision that is "illegal" under the NLRA. *Id.* at 15a. The court thus deemed the class waiver unenforceable. *Id.* at 20a.

SUMMARY OF ARGUMENT

I.A. In cases involving the interaction of two federal statutes, the first objective is to harmonize the competing provisions, if at all possible. So long as the "two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

The FAA and NLRA can indeed co-exist. The FAA unambiguously mandates enforcement of class waivers in arbitration agreements, and the NLRA contains no "clearly expressed congressional intention to the contrary." *Id.* So the Court should do what it has done in prior cases involving the FAA and other federal statutes: construe the other statute in a way that harmonizes it with the FAA.

B. Start with the FAA. Section 2 declares that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The first part is unequivocal: Arbitration provisions must be enforced. And the latter part—the so-called saving clause—offers no escape hatch here, for any one of four reasons.

First, the saving clause saves *inferior* laws; it has no application to other federal statutes like the

NLRA. Second, the NLRA is not a ground for the revocation of "*any* contract," because only one type of contract—between employers and employees—is subject to the NLRA. *Id.* (emphasis added); *see Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984). Third, if the NLRA were construed to prohibit class waivers, it would "interfere[] with fundamental attributes of arbitration," *Concepcion*, 563 U.S. at 344, and the saving clause does not apply to any ground that disfavors arbitration's "defining features," *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Fourth, a rule prohibiting class waivers under the NLRA would not be a ground "for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), because it would have nothing to do with the contract's "*formation*"—that is, "whether the contract was properly *made*." *Concepcion*, 131 S. Ct. at 355, 357 (Thomas, J., concurring) (emphases added).

Because the saving clause does not apply, the FAA unequivocally declares that the class waivers in these cases shall be enforceable. The question, then, is whether the NLRA can plausibly be read so as not to conflict with that mandate. The Court has a duty to find a way to harmonize the NLRA with the FAA if it can, and only a "clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551—also known as a "contrary congressional command," *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012)—can prevent the Court from doing so.

C. The NLRA does not contain a "clearly expressed congressional intention" to bar class waivers. The text of the NLRA makes no mention of class proceedings, and the NLRA was enacted long before the rules governing class and collective actions. The

NLRA is thus just like the antitrust laws in *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which this Court held contained no congressional command requiring rejection of class waivers. Like those antitrust laws, the NLRA can be reasonably construed to permit class waivers, consistent with the FAA.

In fact, that is not just *a* reasonable construction of the NLRA; it is *the only* reasonable construction. Every tool of statutory construction points to the same conclusion: Though Section 7 protects a right to "engage in * * * concerted activities," those activities do not include class proceedings. 29 U.S.C. § 157. The traditional tools of statutory interpretation make clear that Section 7 creates rights for employees; it does not impose any corresponding obligations on employers or third parties. Reading "concerted activities" to include class proceedings would violate that rule because employees cannot exercise a right to litigate as a class unless employers and tribunals are obligated to treat them as a class.

In any event, even if class proceedings could be considered a form of concerted activity, Section 8(a)(1) of the NLRA does not unambiguously make class waivers an unfair labor practice. Section 8(a)(1) bars employers from "interfer[ing] with" an employee's *substantive* right to engage in concerted activities. *Id.* § 158(a)(1). It does not unambiguously prevent employers from channeling concerted activities into particular *procedural* forms. And even if it did, employees would be free to waive that *procedural* right, as they did here. The Seventh Circuit's reading of the NLRA as prohibiting class waivers would lead to absurd results—making employment arbitration a thing of the past, and

forcing employers and courts alike to acquiesce whenever employees seek class certification. The NLRA can—and should—be interpreted harmoniously with the FAA by construing the NLRA to permit the class waivers here.

D. The Board's contrary view is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Most fundamentally, there is no room for any deference. The NLRA unambiguously does *not* prohibit class waivers. And even if the NLRA were ambiguous, there would be only one way of construing it in harmony with the FAA's unambiguous mandate—making that the only permissible construction that a court or agency could adopt. In addition, Congress has not delegated any authority to the Board to administer the FAA, so the Board's attempt to balance the policies underlying both statutes should not be given any special weight.

II. Even if the two statutes could not be reconciled, the class waivers should still be enforced. A specific statute should trump a general one, and the FAA is the specific statute here because it contemplates the precise scenario at issue: arbitration provisions in employment contracts. *See* 9 U.S.C. § 1; *Circuit City*, 532 U.S. at 114-119. Indeed, when displacing the FAA in other statutes, Congress has spoken with much more specificity than it has in the NLRA. Moreover, prohibiting class waivers would strike at the core of the FAA's protections while addressing what is, at most, a peripheral concern of the NLRA. In the event of an irreconcilable conflict, therefore, the FAA should be given priority.

For these reasons, class waivers in arbitration agreements between employers and their employees should be enforced. The Fifth Circuit should be affirmed, and the Seventh Circuit should be reversed.

ARGUMENT

These cases concern the enforceability of class waivers in arbitration agreements between employers and employees. That issue lies at the intersection of two federal statutes—one about arbitration agreements and the other about employer-employee relations.

The statute about arbitration agreements is the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, enacted in 1925. *See* Ch. 213, 43 Stat. 883 (1925); Ch. 392, 61 Stat. 669 (1947) (codifying the FAA as Title 9). The FAA's "primary" provision is Section 2, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), which states:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The other statute—about employer-employee relations—is the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, enacted in 1935. Ch. 372, 49 Stat. 449 (1935). Section 7 of the NLRA gives employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through

representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of th[ose] rights" commits an "unfair labor practice" under Section 8(a)(1) of the NLRA. *Id.* § 158(a)(1).

I. THE FAA AND THE NLRA SHOULD BE INTERPRETED HARMONIOUSLY TO MANDATE ENFORCING THE CLASS WAIVERS

The FAA unambiguously mandates the enforcement of the class waivers in these cases, and the NLRA contains no clearly expressed congressional intention to the contrary. Because the NLRA can be reasonably construed as consistent with the FAA's mandate, this Court should adopt that construction and declare the class waivers enforceable.

A. Absent A Clearly Expressed Congressional Intention To The Contrary, The FAA And The NLRA Should Be Interpreted Harmoniously

1. In cases involving the interaction of two federal statutes, a court's first task is to determine whether the two statutes can be interpreted harmoniously. That is because the U.S. Code is presumed to have a single, intelligent drafter. *See* William N. Eskridge, Jr., *Interpreting Law: A Primer on How To Read Statutes and the Constitution* 118 (2016). And "intelligent drafters" presumably "do not contradict themselves." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012). Hence the harmonization principle: "[W]hen two statutes are capable of co-existence, it is the duty of

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551; *see also W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (explaining that a statutory term should be construed "to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law").

Reinforcing this harmonization principle is the "cardinal rule" that "repeals by implication are not favored." *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). That rule rests on a "strong[]" presumption that "Congress will specifically address language on the statute books that it wishes to change." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988); *see also Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) ("[I]mplied amendments are no more favored than implied repeals."). Thus, a repeal will not be inferred "unless the intention of the legislature to repeal is clear and manifest." *Hui* v. *Castaneda*, 559 U.S. 799, 810 (2010) (internal quotation marks omitted).

2. This Court's decisions involving the FAA and other federal statutes reflect these principles. In those prior cases, the FAA unambiguously mandated enforcement of the arbitration provisions at issue. Applying the harmonization principle, the Court then proceeded to determine whether the other statute could be read to be consistent with the FAA's unambiguous mandate. And in case after case, the Court answered yes, finding in the other statute no "clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551, or "contrary congressional command," *CompuCredit*, 565 U.S. at 98—two ways of saying the same thing.

Vimar Seguros y Reaseguros, S.A. v. *M/V Sky Reefer*, 515 U.S. 528 (1995), for example, involved the FAA and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. app. § 1300 *et seq.* COGSA imposes liability on carriers of goods by sea for violating certain standards of conduct. *Vimar*, 515 U.S. at 534-535. COGSA further provides that any agreement "lessening such liability * * * shall be null and void and of no effect." 46 U.S.C. app. § 1303(8). The petitioner challenged an arbitration agreement as void under COGSA, while the respondents argued that the agreement was enforceable under the FAA. *See Vimar*, 515 U.S. at 531-532. Starting from the premise that "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective," *id.* at 533 (quoting *Morton*, 417 U.S. at 551), the Court concluded that COGSA should be construed to permit enforcement of the arbitration agreement, thereby avoiding any conflict with the FAA, *see id.* at 533-539. Because both statutes could be "given full effect," *id.* at 541, the Court found it "unnecessary to resolve the further question whether the [FAA] would override COGSA were [COGSA] interpreted otherwise," *id.* at 530.

Shearson/American Express Inc. v. *McMahon*, 482 U.S. 220 (1987), involved the FAA and two other federal statutes, the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* The respondents argued that the Exchange Act and RICO invalidated agreements to arbitrate claims under those two statutes, while the petitioners argued that the agreements were enforceable under the FAA. *See McMahon*, 482 U.S.

at 223, 227. The Court concluded that the FAA, "standing alone," "mandate[d] enforcement of [the] agreements." *Id.* at 226. It then placed the "burden" on the respondents—the parties "opposing arbitration"—to show that the Exchange Act and RICO could not be reconciled with that "mandate." *Id.* at 226-227. After considering those two statutes, the Court held that there was no such "contrary congressional command" in either one. *Id.* at 226, 238, 242. Rather than read the Exchange Act and RICO as "exception[s]" to the FAA, *id.* at 227, the Court harmonized the statutes and deemed the arbitration agreements enforceable, *id.* at 238, 242.

The Court followed a similar path in *Gilmer*, a case involving the FAA and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* The petitioner argued that the ADEA invalidated an agreement to arbitrate claims under that statute, while the respondent argued that the agreement was enforceable under the FAA. *See Gilmer*, 500 U.S. at 23-24, 26-27. As in *McMahon*, the Court placed the "burden" on the party opposing arbitration to show that the other statute could not be reconciled with the FAA's mandate. *Id.* at 26. Because the petitioner failed to meet that burden, the Court upheld the enforceability of the arbitration agreement. *Id.* at 35.

CompuCredit is another example. The other federal statute in that case was the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.* The respondents argued that the CROA precluded enforcement of an agreement to arbitrate claims under that statute, while the petitioners argued that the agreement was enforceable under the FAA. *See CompuCredit*, 565 U.S. at 97. The Court reasoned

that the FAA's "mandate" had to be obeyed, unless the CROA contained "a contrary congressional command"—that is, unless the CROA could not be reconciled with the FAA. *Id.* at 98 (quoting *McMahon*, 482 U.S. at 226). The Court found no such command in the CROA; indeed, the Court explained, "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id.* at 103.

Concurring in the judgment, Justice Sotomayor, joined by Justice Kagan, emphasized that while the respondents had advanced a "plausible" interpretation of the CROA, it was "no more compelling than the contrary construction that petitioners [had] urge[d]." *Id.* at 108-109 (Sotomayor, J., concurring in the judgment). The parties' arguments were thus "in equipoise," leaving the meaning of the CROA in "doubt[]." *Id.* at 109. Given that ambiguity, Justice Sotomayor concluded that "[the Court's] precedents require that petitioners prevail," "because respondents, as the opponents of arbitration, bear the burden of showing that Congress disallowed arbitration of their claims, and because [the Court] resolve[s] doubts in favor of arbitration." *Id.* Thus, like the majority, Justice Sotomayor construed the CROA to avoid any conflict with the FAA.

The pattern in these cases is undeniable. In each, the FAA unambiguously "mandate[d] enforcement" of the arbitration agreement at issue. *McMahon*, 482 U.S. at 226. So it was the Court's "duty" to reconcile the other federal statute with that mandate, "absent a clearly expressed congressional intention to the contrary." *Vimar*, 515 U.S. at 533 (quoting *Morton*, 417 U.S. at 551). And in each case, the parties

opposing arbitration failed to meet their "burden" of showing such a "contrary congressional command." *McMahon*, 482 U.S. at 226; *see also Italian Colors*, 133 S. Ct. at 2309-2310 (no "congressional command" in the Sherman and Clayton Acts "contrary" to the FAA); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-629 (1985) (no "intention" in the Sherman Act to preclude enforcing an international arbitration agreement); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519-520 (1974) (Exchange Act does not preclude enforcing an international arbitration agreement).

Of course, there may have been times when the other statute could have "plausibl[y]" been read as contrary to the FAA. *CompuCredit*, 565 U.S. at 108 (Sotomayor, J., concurring in the judgment). But as Justice Sotomayor has explained, that is not enough: To avoid needless conflict, the Court's precedent requires that any "doubts" in the other statute be resolved "in favor of arbitration." *Id.* at 109. It should come as no surprise, then, that in the more than 90 years the FAA has been on the books, the Court has been unable to reconcile another federal statute with the FAA only once—in a decision the Court eventually overruled. *See Wilko* v. *Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-485 (1989) (Securities Act of 1933 does not preclude enforcing an arbitration agreement).

B. The FAA Unambiguously Mandates Enforcement Of The Class Waivers

These consolidated cases are no different from the cases discussed above. The question is identical: Can the FAA and another statute be harmonized? In

each of the cases above, the FAA unambiguously "mandate[d] enforcement" of the arbitration provisions at issue. *McMahon*, 482 U.S. at 226. The same is true here.

Section 2 of the FAA establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Its "purpose was to place an arbitration agreement upon the same footing as other contracts *** and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-220 (1985) (internal quotation marks omitted). To that end, Section 2 "requires courts to enforce agreements to arbitrate according to their terms." *CompuCredit*, 565 U.S. at 98. It declares that an "arbitration" provision in a "contract evidencing a transaction involving commerce *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The class waivers here are provisions requiring that arbitration be conducted on an individual, rather than collective, basis. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("[P]arties may specify *with whom* they choose to arbitrate their disputes."). Those provisions are undisputedly part of "contract[s] evidencing *** transaction[s] involving commerce." 9 U.S.C. § 2; *see also EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("Employment contracts, except for those covering workers engaged in transportation, are covered by the FAA."). Section 2 of the FAA thus declares them "valid, irrevocable, and enforceable," unless the saving clause applies to the NLRA.

This Court has *never* applied the saving clause in a case involving an alleged conflict between the FAA and another federal statute. Indeed, in each of the cases discussed above, the Court asked whether the other statute contained a contrary congressional command, not whether it fell within the saving clause. *See Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 565 U.S. 95; *Vimar*, 515 U.S. 528; *Gilmer*, 500 U.S. 20; *Rodriguez de Quijas*, 490 U.S. 477; *McMahon*, 482 U.S. 220; *Mitsubishi Motors*, 473 U.S. 614; *Scherk*, 417 U.S. 506. The saving clause is similarly inapplicable here. It does not apply to the NLRA, for four independent reasons.

First, saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save "other federal statutes enacted by the same sovereign." *NLRB* v. *Alt. Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *18 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part); *see Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). That is because "[f]ederal statutes do not need to be 'saved' by a coequal statute in order to have effect." *Alt. Entm't*, 2017 WL 2297620, at *18. If Congress wanted another federal statute to override the FAA, it could simply say so. That explains why the saving clause has *never* played a role in this Court's cases involving the FAA and another federal statute.

Second, the saving clause applies only to grounds for the revocation of "*any* contract." 9 U.S.C. §2 (emphasis added). By its plain meaning, that phrase includes "generally applicable contract defenses, such as fraud, duress, or unconscionability," that may be invoked with respect to *any* contract, regardless of its subject matter. *Doctor's Assocs., Inc.* v.

Casarotto, 517 U.S. 681, 687 (1996). The phrase in turn excludes defenses—like any contained in the NLRA—that may be invoked only with respect to a specific subset of contracts, such as employment agreements.

The Court confirmed this straightforward reading in *Southland*, a case involving the California Franchise Investment Law. *See* 465 U.S. at 3-4. That law set out a series of unwaivable protections for franchisees, which California's highest court had construed to invalidate arbitration provisions in franchise agreements. *Id.* at 10. This Court concluded that, so construed, the franchise law "directly conflict[ed]" with Section 2 of the FAA, which "mandated the enforcement" of such provisions. *Id.*

The Court specifically considered whether the franchise law might nevertheless be permitted to invalidate the arbitration provisions under Section 2's saving clause. The Court "agree[d], of course, that a party may assert *general* contract defenses such as fraud to avoid enforcement of an arbitration agreement." *Id.* at 16 n.11 (emphasis added). But the Court held that, unlike fraud, "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* Rather, it was "merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the California Franchise Investment Law*"—namely, franchise agreements. *Id.* (emphasis added). The Court therefore concluded that the saving clause did not apply.

Southland compels the same conclusion here. Like the franchise law, the NLRA is "not a ground that

exists at law or in equity 'for the revocation of *any* contract.'" *Id.* Rather, the NLRA is merely a ground that exists for the revocation of arbitration provisions in contracts *subject to the NLRA*. And the NLRA "covers only one type of contract, that between an employer and its covered employees." *D.R. Horton*, 357 N.L.R.B. at 2287.[1] Statutes like the franchise law and the NLRA—which govern *some* contracts but not *others*—are beyond the scope of the saving clause.

This, too, explains why this Court has *never* relied on the saving clause in a decision involving the FAA and another federal statute. Like the NLRA, the federal statutes at issue in the Court's prior cases governed a particular subject matter—for instance, the carriage of goods in *Vimar*, the employment relationship in *Gilmer*, and the practices of credit repair organizations in *CompuCredit*. Thus, to the extent those statutes could have been grounds for revocation at all, they would not have been grounds for revocation of "*any* contract"; they would have merely been grounds for revocation of contracts *of the same subject matter*—bills of lading in *Vimar*, contracts involving employment in *Gilmer*, and consumer contracts in *CompuCredit*. Because the saving clause covers only "general contract defenses," it had no application in those prior cases—just as it has no application here. *Southland*, 465 U.S. at 16 n.11; *see*

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[1] The NLRA does not even cover *all* employment contracts. For instance, "significant numbers of workers typically considered to be 'employees' in lay terms—supervisors, government employees, and independent contractors being perhaps the largest groups—are not covered by Sec. 7." *D.R. Horton*, 357 N.L.R.B. at 2288 n.27; *see* 29 U.S.C. § 152(2), (3), (11).

also, e.g., *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 163 (2d Cir. 1989); *Carter* v. *SSC Odin Operating Co.*, 927 N.E.2d 1207, 1219 (Ill. 2010).

In reaching a contrary conclusion, the Seventh Circuit reasoned that the NLRA renders the arbitration provision at issue "illegal," and that "[i]llegality is one of th[e] grounds" for revocation cognizable under the saving clause. *Epic* Pet. App. 15a. In *Southland*, Justice Stevens adopted that very reasoning—in *lone dissent*. In his view, the franchise law rendered the arbitration provisions "void as a matter of public policy," and "[a] contract which is deemed void is surely revocable at law or in equity." *Southland*, 465 U.S. at 20 (Stevens, J., concurring in part and dissenting in part). Thus, according to Justice Stevens, the saving clause provided a "textual basis" for "avoiding" a conflict between the FAA and the franchise law. *Id.* at 19.

The Court in *Southland* disagreed. *Id.* at 16 n.11 (majority opinion). It made clear that cloaking a narrowly applicable law (like the franchise law or the NLRA) in the garb of a generally applicable contract defense (like public policy or illegality) is not enough to bring the law within the saving clause. *Id.* Otherwise, this simple dodge would make the saving clause applicable to *all* contrary laws, federal or state. That cannot be squared with either *Southland* or this Court's unbroken line of cases enforcing the FAA in the face of narrowly applicable federal statutes without even a mention of the saving clause.[2]

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[2] In *Vimar*, Justice Stevens reiterated his view of the saving clause—again in solo dissent. *See* 515 U.S. at 556 (Stevens, J., dissenting). In addressing whether the FAA and COGSA were

Because—like those other federal laws—the NLRA is not a "general contract defense[]," *id.*, it is not a ground covered by the saving clause.

Third, the saving clause does not preserve any ground that would "interfere[] with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. That is because Section 2 of the FAA "establishes an equal-treatment principle": A court may not invalidate an arbitration provision based on "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). Accordingly, the saving clause does not preserve any "rule discriminating on its face against arbitration." *Id.* Nor does it preserve "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.*; *see also Concepcion*, 563 U.S. at 343 (explaining that the saving clause "cannot in reason be construed" as preserving defenses "absolutely inconsistent with" the FAA (internal quotation marks omitted)).

Applying this principle in *Concepcion*, the Court held that the saving clause could not be construed to preserve California's so-called *Discover Bank* rule—a rule prohibiting certain class waivers as unconscionable. 563 U.S. at 340. Such a rule, the Court explained, "interferes with fundamental attributes of arbitration." *Id.* at 344. After all, the point of arbi-

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"capable of co-existence," the Court in *Vimar* did not reference the saving clause even once. *Id.* at 533 (majority opinion) (quoting *Morton*, 417 U.S. at 551).

tration is to "allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* Yet "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348. In fact, "class arbitration *requires* procedural formality," at least if it is to bind absent class members. *Id.* at 349. Worse still, it "greatly increases risks to defendants," who must face all the risks of class proceedings without any "effective means of review." *Id.* at 350-351. The *Discover Bank* rule thus discriminated against arbitration by disfavoring one of arbitration's defining features—namely, the absence of class proceedings. And so the Court found the *Discover Bank* rule preempted, declining to construe the saving clause to preserve it. *Id.* at 352.

The lesson of *Concepcion* is plain: Because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration," the saving clause cannot be construed to preserve such a rule. *Id.* at 344. Thus, even if such a rule could be derived from the NLRA, it would not be covered by the saving clause. *See Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141-142 (Cal. 2014) (Liu, J.) (finding the issue here indistinguishable from *Concepcion*).

Attempting to escape that conclusion, the Seventh Circuit observed that *Concepcion* was a case about the FAA's relationship with a state law, as opposed to another federal statute. *Epic* Pet. App. 17a. But whether the other law is state or federal matters only to what happens if that law *conflicts* with the FAA: A conflicting state law is necessarily preempt-

ed, whereas a conflicting federal law may or may not be given priority. *See infra* pp. 54-57. *Concepcion*'s interpretation of the saving clause goes to an antecedent question: whether the FAA can be read to *accommodate* the other law, thereby avoiding any conflict in the first place. And the answer to that question does not depend on whether the other law is state or federal. A federal law "[r]equiring the availability of classwide arbitration" would "interfere[] with fundamental attributes of arbitration" no less than a state law would. For purposes of the saving clause, therefore, whether the other law is the *Discover Bank* rule or the NLRA makes no difference: Either way, the saving clause "cannot in reason be construed" to accommodate a rule requiring the availability of class arbitration. *Concepcion*, 563 U.S. at 343 (internal quotation marks omitted); *see also Italian Colors*, 133 S. Ct. at 2310, 2312 & n.5 (relying on *Concepcion* in a case where the other law was federal, and rejecting the dissent's "dismiss[al]" of *Concepcion* as "a case involving pre-emption").

The Seventh Circuit also maintained that the rule in *Concepcion* was "directed toward arbitration," whereas the NLRA is a "general principle." *Epic* Pet. App. 17a. That misunderstands both the *Discover Bank* rule and the NLRA. The *Discover Bank* rule was an application of the unconscionability doctrine, a "generally applicable contract defense[]." *Concepcion*, 563 U.S. at 339 (internal quotation marks omitted). The NLRA, by contrast, applies only to a narrow subset of contracts. *See supra* pp. 20-24. In any event, what mattered in *Concepcion* was what a rule prohibiting class waivers would "accomplish[]." *Kindred Nursing*, 137 S. Ct. at 1426. And because both the NLRA and the *Discover Bank* rule would

accomplish the same thing—namely, both would "interfere[] with fundamental attributes of arbitration"—*Concepcion* compels the conclusion that the saving clause does not apply here. 563 U.S. at 344.

Fourth, the saving clause applies only to grounds "for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). Though Section 2 provides that an arbitration provision shall be "valid, irrevocable, and enforceable," the saving clause "does not parallel" those words "by referencing the grounds as exist for the 'invalidation, revocation, or nonenforcement' of any contract." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring). Instead, the saving clause "repeat[s] only one of the three concepts": "revocation." *Id.* The text thus demonstrates that the saving clause "does not include all defenses applicable to any contract but rather some subset of those defenses." *Id.* Lewis seems to acknowledge as much. *See Epic* Br. in Opp. 34 n.7 (explaining that "revocable" has a narrower meaning than "unenforceable" in the context of a saving clause).

The question, then, is which defenses the saving clause includes. Section 4 of the FAA provides the answer. That section gives a party aggrieved by the failure to arbitrate the right to seek an order compelling arbitration. 9 U.S.C. § 4. And it authorizes a court to grant such an order "upon being satisfied that the *making* of the agreement for arbitration or the failure to comply therewith is not in issue." *Id.* (emphasis added). Section 4 thus clarifies that a court, before directing the parties to arbitration, may consider only certain defenses—defenses relating to "the making of the agreement." *Id.*; *see also Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967) ("[I]f the claim is fraud in the

inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it."). And for the statutory scheme to make sense, the grounds for "revocation" preserved by the saving clause must be understood to track those same defenses. *See Concepcion*, 563 U.S. at 354-355 (Thomas, J., concurring). Otherwise, Section 2 would preserve defenses pertaining to the arbitration agreement that a court would not be able to consider under Section 4—which would be absurd.

This reading of Section 2 is reinforced by the history of the FAA. "The text of the FAA was based upon that of New York's arbitration statute." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008); *see also* S. Rep. No. 68-536, at 3 (1924); 1920 N.Y. Laws ch. 275, art. 2, § 2 (providing that arbitration provisions "shall be valid, enforcible, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract"). And in 1923, New York's highest court construed the text of New York's law and explained that the "word 'irrevocable,' here used, means that the contract to arbitrate * * * can only be set aside for facts existing at or before *the time of its making* which would move a court of law or equity to revoke any other contract or provision of a contract." *Zimmerman* v. *Cohen*, 139 N.E. 764, 766 (N.Y. 1923) (emphasis added). New York's highest court thus tied the concept of revocability to the "time of the [agreement's] making"—suggesting that the saving clause's concern was limited to whether the agreement was properly made. When Congress enacted the FAA two years later, it was presumably aware of that authoritative

interpretation of the statute it was copying. *See Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978).

The NLRA does not relate to the making of an agreement. If the NLRA were read to prohibit the arbitration provisions here, it would be not because of how the provisions were made, but rather because of what they contained—a waiver of class proceedings. The objection, in other words, would be to the substance of the provisions, not to their formation. Indeed, the objection would be no different from one based on California's *Discover Bank* rule, which Justice Thomas had no trouble concluding related to "public-policy reasons," not to "whether the contract was properly made." *Concepcion*, 563 U.S. at 357 (Thomas, J., concurring); *see also Italian Colors*, 133 S. Ct. at 2312-2313 (Thomas, J., concurring) (concluding that an argument that a class waiver contravened the antitrust laws did not "concern[] whether the contract was properly made" (internal quotation marks omitted)). Because the NLRA does not relate to contract formation, it is not a ground "for the *revocation*" of a contract within the meaning of the saving clause.

For each of these reasons, the saving clause does not apply. The Court is left with the unequivocal terms of the rest of Section 2: Arbitration provisions such as these "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA unambiguously mandates enforcement of the class waivers in these cases.

C. The NLRA Can Be Reasonably Construed To Avoid Conflicting With The FAA

The question, then, is whether the NLRA can be construed to avoid conflicting with the FAA's unam-

biguous mandate. If there is any ambiguity in the NLRA, the answer must be yes, because this Court has a "duty" to harmonize two statutes "capable of co-existence." *Morton*, 417 U.S. at 551. Indeed, that duty is particularly strong here, given the presumption that the later-enacted NLRA did not impliedly repeal or amend the FAA. *Fausto*, 484 U.S. at 453. Accordingly, only a "clearly expressed congressional intention" can stand in the way of reconciling the NLRA with the FAA, *Morton*, 417 U.S. at 551, and the "burden" rests with the parties resisting enforcement of the arbitration agreement to point to such a "contrary congressional command," *McMahon*, 482 U.S. at 226-227.

That burden cannot be met here. Congress did not clearly express any intention to include class proceedings within the right to "engage in * * * concerted activities" under Section 7. 29 U.S.C. § 157. Even if it did, Section 8(a)(1)'s bar on employer actions that "interfere with, restrain, or coerce" the exercise of that right does not unambiguously prohibit employers from channeling concerted activities into a particular procedural form. *Id.* § 158(a)(1). And in any event, nothing in the NLRA suggests that employees cannot voluntarily waive a procedural right to take part in class proceedings. For any one of these reasons, the NLRA can—and should—be interpreted harmoniously with the FAA, and the class waivers should be enforced.

1. "Concerted activities" under Section 7 do not unambiguously include class proceedings

a. Section 7 of the NLRA gives employees the right to engage in "concerted activities." 29 U.S.C. § 157.

To establish a congressional command contrary to the FAA, the other side would have to identify a "clearly expressed congressional intention" in the NLRA to include class proceedings within the meaning of "concerted activities." *Morton*, 417 U.S. at 551. No such intention, however, can be clearly discerned "in the text of the [NLRA], its legislative history, or an inherent conflict between [individual] arbitration and the [NLRA's] underlying purposes." *Gilmer*, 500 U.S. at 26 (internal quotation marks omitted).

When it comes to the NLRA's text and history, this Court's decision in *Italian Colors* is all but dispositive. *Italian Colors* involved the Sherman and Clayton Acts; the respondents argued that those antitrust laws invalidated a class waiver in an arbitration agreement, while the petitioners argued that the class waiver was enforceable under the FAA. 133 S. Ct. at 2308-2309. The Court held that the antitrust laws contained no "congressional command" "contrary" to "the FAA's mandate." *Id.* at 2309. The antitrust laws "make no mention of class actions" and, "[i]n fact," "were enacted decades before the advent of Federal Rule of Civil Procedure 23." *Id.* It would be "remarkable for a court to erase" a class waiver based on statutes enacted at a time when the "usual rule" was "individual" dispute resolution. *Id.* (internal quotation marks omitted). The Court thus concluded that the "antitrust laws do not evince an intention to preclude a waiver of class-action procedure." *Id.* (internal quotation marks and brackets omitted).

There are no grounds for a different conclusion here. Like the text of the antitrust laws, the text of the NLRA makes no mention of class actions or class arbitration. In fact, Section 7 makes no mention of

adjudication or arbitration at all. The text of Section 7 thus stands in stark contrast to that of other statutes, which *do* clearly express a congressional intention contrary to the FAA. *See CompuCredit*, 565 U.S. at 103-104 (citing, *e.g.*, 7 U.S.C. § 26(n)(2), providing that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section"); *infra* pp. 55-56 (providing other examples).

Also like the antitrust laws, the NLRA was enacted before Rule 23 and the FLSA, neither of which existed until 1938. *See Italian Colors*, 133 S. Ct. at 2311 (noting the "adoption of the class action for legal relief in 1938"); Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060, 1069 (codified at 29 U.S.C. § 216(b)). Given that history, Congress could not have intended "concerted activities" to include class actions under Rule 23 or collective actions under the FLSA. Nor could Congress have intended them to include class arbitrations, which were barely recognized before the twenty-first century; the American Arbitration Association (AAA) and JAMS did not even adopt rules governing class proceedings until 2003 and 2005, respectively. *See* S.I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* ¶ 2.35, at 43 (2013).

As for the NLRA's underlying purposes, they do not clearly express any intention to prohibit class waivers either. Congress enacted the NLRA to "encourag[e] practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U.S.C. § 151. Just as collective bargaining is such a practice, so is individual arbitration. In fact, this Court has held that arbitration is of "particular

importance" in the employment context, in which disputes "often involve[] smaller sums of money" that would otherwise be dwarfed by the "costs of litigation." *Circuit City*, 532 U.S. at 123. The NLRA's purposes thus do not "inherent[ly] conflict" with individual arbitration. *Gilmer*, 500 U.S. at 26.

One could stop there, for the foregoing is enough to establish that there is no "clearly expressed congressional intention" in the NLRA to include class proceedings within the meaning of "concerted activities." *Morton*, 417 U.S. at 551. Even if "concerted activities" could "plausibl[y]" be read to include class proceedings, that reading is hardly compelled, and any "doubts" about the meaning of the NLRA must be resolved in favor of harmonizing the statute with the FAA. *CompuCredit*, 565 U.S. at 108-109 (Sotomayor, J., concurring in the judgment); *see McMahon*, 482 U.S. at 226-227.

b. In any event, construing "concerted activities" to include class proceedings is not even a *plausible* interpretation of Section 7. The traditional tools of statutory construction affirmatively rule out that interpretation, making clear beyond doubt that Congress did *not* intend "concerted activities" to encompass class proceedings.

i. Start with the settled principle that "[w]ords in a list are generally known by the company they keep." *Logan* v. *United States*, 552 U.S. 23, 31 (2007). "[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St.*, 552 U.S. at 586; *see also Circuit City*, 532 U.S. at 114-115 (applying the *ejusdem generis* canon to the FAA).

In Section 7, the general term "other concerted activities" follows a series of specific items: (1) "self-organization"; (2) "form[ing], join[ing], or assist[ing] labor organizations"; and (3) "bargain[ing] collectively." 29 U.S.C. § 157. These examples have one basic characteristic in common: They are all things that employees can engage in either on their own or with the involvement of no one other than their employers. If, for example, employees want to self-organize or form a union, that is something they can simply do, without the involvement of anyone else. If they want to bargain collectively, the only other party that has to participate is their employer.

"But class litigation is not something that employees just *do*," even with their employers. *Alt. Entm't*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part). Class proceedings require the involvement of third parties—at a minimum, the courts or arbitrators that hear the claims. Thus, unlike the specific activities listed in Section 7, class proceedings burden parties extrinsic to the employer-employee relationship. This is no small distinction. The general term "other concerted activities" should not be read in a way that imposes obligations on outside parties, where the specifically enumerated activities do no such thing. *See NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 & n.8 (1984) (reading "*other* concerted activities" in light of the "enumerated activities").

ii. The structure of the NLRA confirms this interpretation. When Congress intended to place obligations on any party, including courts and mediators, it expressly set out those obligations. For example, Section 8(d)(3) requires a party to notify the "Federal Mediation and Conciliation Service" when it desires

to modify or terminate a collective-bargaining agreement in certain industries. 29 U.S.C. § 158(d)(3). If "the collective bargaining involves employees of a health care institution," Section 8(d)(C) provides that the Service "shall promptly communicate with the parties and use its best efforts * * * to bring them to agreement." *Id.* § 158(d)(C). Similarly, Sections 10(e) and 10(f) give the Board or an aggrieved person the right to obtain judicial review, but they also specify what the courts "shall" do when such a suit is filed. *Id.* § 160(e), (f).

Indeed, even with respect to the employer-employee relationship, Congress did not assume that the creation of a right for one party was sufficient to impose a corresponding obligation on the other. Most significantly, the right of employees to "bargain collectively through representatives of their own choosing" is specifically listed in Section 7. *Id.* at § 157. Yet Congress clearly did not believe that the enumeration of that right, even when coupled with Section 8(a)(1)'s prohibition on employer "interfere[nce]," *id.* § 158(a)(1), was sufficient to obligate employers to bargain with their employees as a unit. So, in Section 8(a)(5), Congress made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *Id.* § 158(a)(5). Similarly, in Section 8(d), Congress imposed an express "obligation" on employers to "meet" and "confer" with their employees' collective-bargaining "representative[s]." *Id.* § 158(d). Sections 8(a)(5) and 8(d) accomplish what Sections 7 and 8(a)(1) alone do not: They require employers to treat employees as a unit at the bargaining table.

Congress chose not to enact any similar provisions requiring courts, arbitrators, or employers to treat

employees as a unit within a judicial or arbitral forum. *See Dep't of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). This Court should not override that choice by reading "concerted activities" to encompass class proceedings.

iii. This Court's precedent leads to the same conclusion. The Court has recognized "concerted activities" in numerous cases. In each case, those activities took the form of things that employees could do without the involvement of anyone else; none imposed any novel obligation on employers or outside parties to treat employees as a unit. *See City Disposal*, 465 U.S. at 830-837 (unilaterally asserting benefits conferred in a collective-bargaining agreement); *Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 703 (1983) (holding union office); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("seeking to have the assistance of [the] union representative"); *Hous. Insulation Contractors Ass'n* v. *NLRB*, 386 U.S. 664, 668-669 (1967) (refusing to work); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-234 (1963) (striking); *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 13-14 (1962) (walking out of work); *NLRB* v. *Drivers*, 362 U.S. 274, 279 (1960) (recruiting new union members).

Eastex v. *NLRB*, 437 U.S. 556 (1978), is no exception. There, the Court noted that some lower courts, as well as the Board, had held that employees engage in "mutual aid or protection" when "they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 565-566 & n.15. But the Court then stated that it was "not address[ing] *** the question of what may constitute

'concerted' activities in this context." *Id.* at 566 n.15. To the extent *Eastex* was even contemplating the possibility that "resort to" a forum might constitute concerted activity, it may have simply had in mind the assertion of rights contained in a collective-bargaining agreement, which this Court has held qualifies as "concerted activit[y]" even when done by "a single employee, acting alone." *City Disposal*, 465 U.S. at 835.

In any event, even if the NLRA were construed to protect *resort to* a forum by a group of employees, that would not mean that it protected their litigating as a class *once inside*. Filing a lawsuit is something that employees can do without placing any new obligations on their employers or the tribunal. Litigating a class action is not. In 2010, the Board's then-General Counsel issued a guideline memorandum distinguishing the two. That memorandum stated that an "employee is still protected by Section 7 of the Act if he or she concertedly *files* an employment-related class action lawsuit in the face of [an arbitration agreement containing a class waiver] and may not be threatened or disciplined for doing so." NLRB, Gen. Counsel Memorandum No. 10-06, at 7 (June 16, 2010) (emphasis added). Nevertheless, the memorandum continued, "[t]he employer * * * may lawfully seek to have a class action complaint *dismissed* by the court on the ground that each purported class member is bound by his or her signing of [the arbitration agreement]." *Id.* (emphasis added).

iv. The history of the NLRA confirms that class proceedings are not included within the right to engage in "concerted activities." To be sure, "there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in

enacting the 'concerted activities' language." *See City Disposal*, 465 U.S. at 834. But the broader historical context in which Congress enacted the NLRA does suggest that, to the extent Congress contemplated Section 7's application in the context of litigation, it did not contemplate class proceedings.

The "source of the language enacted in § 7" was the Norris-LaGuardia Act, a major piece of labor legislation enacted in 1932. *Id.* at 835; *see also* S. Rep. No. 74-573, at 9 (1935) (tracing the language of the NLRA back through various statutes). Section 2 of that Act declared it the "public policy of the United States" that a "worker" "shall be free from the interference, restraint, or coercion of employers * * * in self-organization or in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." Ch. 90, § 2, 47 Stat. 70, 70 (1932) (emphasis added) (codified at 29 U.S.C. § 102). In turn, Section 4 of the Act sought to advance that policy by broadly prohibiting federal courts in cases involving labor disputes from enjoining certain activities, whether done "singly or in concert." *Id.* § 4, 47 Stat. at 70 (codified at 29 U.S.C. § 104).

All of the activities specified in Section 4 were things employees could do on their own, like "[c]easing or refusing to perform any work" or "[b]ecoming or remaining a member of any labor organization." *Id.* § 4(a), (b), 47 Stat. at 70-71 (codified at 29 U.S.C. § 104(a), (b)). Even the one specified activity relating to litigation—"aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court"—fit that description. *Id.* § 4(d), 47 Stat. at 71 (codified at 29 U.S.C. § 104(d)). What Congress had in mind was employ-

ees helping one another by, for instance, "sending money" to litigants—something employees can do of their own accord, without obligating a tribunal or employer to treat them as a class. *Int'l Org.* v. *Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 842 (4th Cir. 1927), *cited in* Felix Frankfurter & Nathan Greene, *The Labor Injunction* 218 n.37 (1930). Given that none of the specified activities had anything to do with class proceedings, there is no reason to think Congress intended "concerted activities" to include class proceedings in the NLRA either. In fact, the sponsor of the NLRA assured his colleagues that Sections 7 and 8 were "grounded in long-established congressional policy." 79 Cong. Rec. 7569 (1935) (statement of Sen. Wagner).

c. Because the tools of statutory construction all point in the same direction, the meaning of the NLRA is unambiguous: Section 7 does *not* confer a right to "engage in *** concerted activities" *by litigating as a class*. At a minimum, there is no "clearly expressed congressional intention" that it *does*. *Morton*, 417 U.S. at 551. Section 7 should thus be interpreted harmoniously with the FAA, and the class waivers should be enforced.

2. *Section 8 does not unambiguously prohibit employers from channeling concerted activities into individual arbitration*

The problems with reading the NLRA to prohibit class waivers do not end with Section 7. To establish a clearly expressed congressional intention to prohibit class waivers, the other side must demonstrate not only that class proceedings unambiguously qualify as a form of "concerted activit[y]," but also that barring

this particular mechanism for engaging in concerted activity is unambiguously a violation of Section 8(a)(1). Even if the other side could conquer the first obstacle, it would still be unable to overcome the second.

a. Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1). The Seventh Circuit held that preventing employees from litigating as a class interferes with, restrains, or coerces their "*substantive*" right to engage in concerted activities within a judicial or arbitral forum. *Epic* Pet. App. 21a (emphasis added); *see also Ernst & Young* Pet. App. 16a (same); *Murphy Oil* Pet. App. 41a (same); *D.R. Horton*, 357 N.L.R.B. at 2278 (same).

Not so. Class waivers leave employees free to work together at every step of the judicial or arbitral process. Employees may cooperate in hiring a lawyer, drafting their complaints, developing their legal strategies, finding and preparing witnesses, writing briefs, and seeking appellate review. They may even pool their financial and legal resources and present the exact same case in the exact same way for every plaintiff. Indeed, the other side cannot point to a single activity that employees can engage in "concerted[ly]" by litigating as a class that they cannot engage in "concerted[ly]" by litigating individually with the support and assistance of their colleagues. To be sure, a class waiver may channel their "concerted activities" into a different *procedural* form, but their exercise of the *substantive* right remains the same. *See Alt. Entm't*, 2017 WL 2297620, at *15 (Sutton, J., concurring in part and dissenting in part) ("[T]he 'concertedness' of litigation does not turn on

the particular procedural form that litigation takes.").

b. Because class waivers merely channel concerted activities into a particular *procedural* form, they may be viewed as an unfair labor practice under Section 8(a)(1) only if one of two things is true: ***First***, it could be that an employer "interfere[s] with, restrain[s], or coerce[s]" the right to concerted activity whenever it places *any* limit on the procedural mechanisms for exercising the right. *Second*, it could be that class proceedings in particular are necessary to the *effective vindication* of the right to concerted activity, such that employers must keep this specific procedural pathway open. Neither of these propositions is true—let alone unambiguously so.

i. As to the proposition that Section 8(a)(1) prohibits employers from restricting *any* procedural avenue for engaging in concerted activities: The Court has repeatedly upheld—and even praised the importance of—agreements mandating arbitration in the employment context. *See, e.g.*, *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 65-66 (2010); *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 32. By waiving a judicial forum, however, such agreements eliminate an entire set of procedural avenues for engaging in concerted activities—including those under Rule 23 and the FLSA.

It would be passing strange if, after repeatedly affirming an employer's ability to place limits on the procedural mechanisms for concerted activity, this Court declared it an unfair labor practice to do so. It would also be surprising to discover that Section 8(a)(1) has prohibited arbitration agreements this whole time, given that "the NLRA is in fact *pro-*

arbitration," as even the Seventh Circuit acknowledged. *Epic* Pet. App. 16a; *see also NLRB* v. *Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (describing "the national policy favoring arbitration" underlying the NLRA).

It is no answer to say that the Court's prior decisions upholding employment arbitration agreements did not reference the NLRA. That merely confirms the point: Neither this Court nor the employees in those cases apparently even considered the possibility that an arbitration agreement would constitute impermissible interference with the right to engage in concerted activities. That in and of itself forecloses the notion that Section 8(a)(1) *unambiguously* requires employers to refrain from placing limits on the procedural mechanisms for concerted activity.

ii. This Court's precedent also forecloses the proposition that there is something about class proceedings in particular that requires employers to make them available in order to avoid violating Section 8(a)(1). In *Gilmer*, for example, the Court "had no qualms in enforcing a class waiver in an arbitration agreement," even though that agreement was being enforced by an employer against its employee, and "even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Italian Colors*, 133 S. Ct. at 2311 (citing *Gilmer*, 500 U.S. at 32). And in *Italian Colors*, the Court explicitly rejected the proposition that the "effective vindication" of a statutory right depends on the availability of class proceedings, when the statute in question was enacted "before [the] adoption of the class action for legal relief in 1938." *Id.* "[T]he individual suit that was considered adequate to assure 'effective vindication'

of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.*

Just so here. When Congress enacted Section 8 of the NLRA in 1935—years before the enactment of Rule 23 or the FLSA and decades before the adoption of class procedures by AAA or JAMS—it could not possibly have believed that class proceedings were necessary to vindicate the right to engage in "concerted activities."

Indeed, class proceedings do not even serve the purpose of that right. Congress granted employees their substantive rights under the NLRA in order to ameliorate the "inequality of bargaining power between employees * * * and employers." 29 U.S.C. § 151. In Congress's view, that inequality led to unfair salaries and working conditions, which in turn led to industrial strife. *Id.* Granting employees the right to engage in "concerted activities" increased their bargaining power and thereby increased the possibility of fair outcomes in interactions between management and labor.

But in a judicial or arbitral forum, outcomes are not dependent on whether claims are heard as a class or individually. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) ("[R]ules allowing multiple claims (and claims by or against multiple parties) to be litigated together * * * neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed."); *Stolt-Nielsen*, 559 U.S. at 696 (Ginsburg, J., dissenting) (quoting same); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) ("[T]he

right of a litigant to employ Rule 23 is a procedural right only * * *."). A fair result is assured by a neutral decision-maker, not the number of litigants on one side. For that reason, class proceedings do not serve the purpose of the right to engage in "concerted activities," and foreclosing the class option cannot be said to preclude the effective vindication of that right.

c. In short, Section 8(a)(1) does not clearly express a congressional intention to make class waivers an unfair labor practice. That provision should not be read to bar agreements requiring individual arbitration.

3. The NLRA does not unambiguously prohibit employees from voluntarily waiving class proceedings

In any event, even if the other side could establish that the NLRA *must* be read to protect a right to take part in class proceedings, employees may still voluntarily waive that procedural right. And under Section 8, there can be no "interfere[nce] with" a right that has been validly waived. 29 U.S.C. § 158(a)(1).

Start from what should be common ground: Employees may validly waive their right to class proceedings in agreements reached through collective bargaining. "This Court long has recognized that a union may waive a member's statutorily protected rights, including his right to strike during the contract term, and his right to refuse to cross a lawful picket line." *Metro. Edison*, 460 U.S. at 705 (internal quotation marks omitted); *see, e.g.*, *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105-106 (1962). Such waivers are valid, "[p]rovided the selection of the

bargaining representative remains free." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 280 (1956) (emphasis omitted). Class waivers impose no constraints on the selection of a bargaining representative, so a collective-bargaining agreement may validly waive class proceedings, thereby mandating individual arbitration of each employee's claims. Not even the Seventh Circuit disputed this point. *See Epic* Pet. App. 17a.

The only difference here is that each employee waived his or her right in an individual agreement. "Nothing in the law," however, "suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009). Indeed, Section 7 itself contemplates that the right to engage in concerted activities may be individually waived because it explicitly gives each employee "the right to *refrain from* any or all of such activities." 29 U.S.C. § 157 (emphasis added).

Nor does it matter that a union might have more bargaining power than an individual when contracting with an employer. As this Court held in *Gilmer*, the mere possibility of unequal bargaining power does not justify a categorical rule "hold[ing] that [individual] arbitration agreements are *never* enforceable." 500 U.S. at 33 (emphasis added). Rather, the Court explained, the "claim of unequal bargaining power is best left for resolution in specific cases," as part of an inquiry into whether the particular agreement at issue "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Id.* (some internal quotation marks omitted).

Here, as in *Gilmer*, there is "no indication" that the employees in question were "coerced or defrauded" into agreeing to the class waivers. *Id.* On the contrary, as the Board's General Counsel once explained, "the relative simplicity and informality" of arbitration benefits "employers and employees alike." NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2. So it should come as no surprise that employees would voluntarily—and thus validly—waive their right to take part in class proceedings.

The Seventh Circuit believed that *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), dictate otherwise. They do not. *National Licorice* involved contracts entered into between employers and individual employees waiving certain Section 7 rights. 309 U.S. at 355. The Court held those contracts unenforceable for two reasons, neither of which applies here. First, the Court held that the contracts were "procured through the mediation of a *company-dominated* labor organization." *Id.* at 360 (emphasis added). In other words, the contracts were not truly *voluntary*. Second, the Court held that the contracts served to "eliminate the Union as the collective bargaining agency of its employees." *Id.* (internal quotation marks omitted). That means the employees were no longer free to select their own bargaining representative. *Id.* As explained, the class waivers here do not suffer from either of those flaws.

J.I. Case is similarly inapposite. That case involved a collective-bargaining agreement governing substantive benefits relating to work and pay. *See* 321 U.S. at 334-335. The issue was whether an individual contract could "be effective as a waiver" of those benefits, and the Court answered no. *Id.* at

338. Unlike the individual contracts in *J.I. Case*, however, the class waivers here do not waive any substantive rights. As explained, employees' substantive right to engage in concerted activities remains intact. *See supra* pp. 40-41. The right to take part in class proceedings "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar.*, 445 U.S. at 332; *see also Italian Colors*, 133 S. Ct. at 2311 ("The class-action waiver merely limits arbitration to the two contracting parties."). And, just as this procedural right could be waived in *Gilmer* and *Italian Colors*, it may be waived here. *See Italian Colors*, 133 S. Ct. at 2310-2311 (citing *Gilmer*, 500 U.S. at 32).

Thus, even if the NLRA does create a right to take part in class proceedings, employees are perfectly free to enter into contracts waiving that procedural right, as they did here.

4. Construing the NLRA to prohibit class waivers would lead to absurd results

For the other side to prevail, this Court would have to hold that "concerted activities" unambiguously include class proceedings, that barring class proceedings unambiguously interferes with an employee's substantive right to engage in "concerted activities," and that the NLRA unambiguously prohibits employees from waiving that right in these circumstances. Not only would that require disregarding text, structure, history, purpose, and precedent, but it would also lead to "absurd results." *McNeill* v. *United States*, 563 U.S. 816, 822 (2011).

For starters, mandatory arbitration in the employment context would be a thing of the past. *Every* agreement requiring arbitration bars proceedings—

including class proceedings—in a *judicial* forum. If barring class proceedings truly interferes with an employee's substantive right to engage in "concerted activities," then every mandatory arbitration agreement would be an unfair labor practice. That would be so even if the agreement provided for class proceedings in an *arbitral* forum. For if the right at issue is truly a substantive right, an employer could not make up for violating it in *one* forum by saying that employees remain able to exercise it in *another* forum. *See D.R. Horton*, 357 N.L.R.B. at 2282 ("[I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."). Every employment agreement would have to "leave[] open a judicial forum for class and collective claims." *Id.* at 2288; *cf. id.* at 2289 n.28 (purporting to reserve judgment on this question).

What is more, employers would be forever prohibited from opposing a request for class certification, no matter the forum. That is because any opposition to class certification would stand in the way of—and thus "interfere with"—an employee's substantive right to engage in concerted activities. 29 U.S.C. § 158(a)(1). Employers would be guilty of an unfair labor practice every time they insisted that the strictures of Rule 23 (or some other class-action provision) be obeyed.

It gets worse. Not only would employers be unable to oppose requests for class certification, but courts would be unable to deny them. The reason is simple: The Rules Enabling Act provides that the federal rules—including Rule 23—"shall not abridge * * * or modify any substantive right." 28 U.S.C. § 2072(b).

So even though Rule 23 "imposes stringent requirements for certification that in practice exclude most claims," *Italian Colors*, 133 S. Ct. at 2310, courts would be powerless to enforce those requirements to bar class proceedings, lest the Rule "abridge" or "modify" an employee's substantive right to engage in concerted activities.

The upshot of all this is that, if the other side's reading of the NLRA is correct, employees could *always* litigate their claims as a class in court, where class certification could *never* be opposed or denied. Congress could not have intended such an outcome. *See* 79 Cong. Rec. at 7569 (statement of Sen. Warner) ("emphasiz[ing]" to his colleagues "how limited" Sections 7 and 8 are "in their scope"). Because the Court should avoid interpretations of a statute that would produce "absurd results," *McNeill*, 563 U.S. at 822, it should not construe the NLRA to bar the class waivers in these cases.

* * *

In the end, the Court is left with one statute (the FAA) that unambiguously mandates enforcement of the class waivers, and another statute (the NLRA) that can—at a minimum—be reasonably construed to permit those waivers. Under these circumstances, the Court's "duty" is plain: to bring the two statutes into harmony by adopting that reasonable construction of the NLRA. *Morton*, 417 U.S. at 551.

D. The Board's Contrary View Is Not Entitled To Deference

In 2012, the Board adopted a different view. *D.R. Horton*, 357 N.L.R.B. at 2277. Having found what it believed to be "an appropriate accommodation of the policies underlying the two statutes," *id.* at 2284, the

Board held that the NLRA renders class waivers unenforceable in arbitration agreements between employers and employees, notwithstanding the FAA. *Id.* at 2277; *see also Murphy Oil* Pet. App. 22a ("reaffirm[ing]" the Board's *D.R. Horton* decision). That view is not entitled to *Chevron* deference.

1. Most fundamentally, there is no room for deference here. At *Chevron*'s first step, a court, after applying the "traditional tools of statutory construction," "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843 & n.9. Here, the NLRA unambiguously does *not* prohibit class waivers. *See supra* pp. 33-49; *NLRB* v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994) (rejecting Board interpretation inconsistent with the NLRA). But even if the NLRA were ambiguous, construing the statute *not* to prohibit class waivers would be the only way of harmonizing it with the unambiguously expressed intent of the FAA. *See supra* pp. 29-49. Because the NLRA is capable of such a construction, a court applying the harmonization principle has a "duty" to adopt it, regardless of the Board's views. *Morton*, 417 U.S. at 551; *see also Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (plurality opinion) ("Were there an interpretation that gave each clause full effect, the [agency] would have been required to adopt it."). The traditional tools of statutory construction thus resolve any ambiguity in the NLRA, leaving only one permissible construction. Any other construction of the NLRA would bring the two federal statutes into conflict, which is something only *Congress* may choose to do. *See CompuCredit*, 565 U.S. at 98 (no conflict absent a "contrary *congressional* command" (emphasis added)); *Morton*, 417

U.S. at 551 (no conflict absent a "clearly expressed *congressional* intention to the contrary" (emphasis added)).

The Court has declined to defer to the Board in similar circumstances. For example, in *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137 (2002), the Board construed the NLRA as authorizing it to remedy an employer's violation of the statute by awarding "backpay to an undocumented alien who ha[d] never been legally authorized to work in the United States." *Id.* at 140. The Court acknowledged that "the Board's discretion to select and fashion remedies for violations of the NLRA" is "generally broad." *Id.* at 142. But it held that this particular remedy was "foreclosed by federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA)." *Id.* at 140. IRCA "made it criminally punishable for an alien to obtain employment with false documents." *Id.* at 149. And because "awarding backpay to illegal aliens r[an] counter to policies underlying IRCA," the Court held that there was no room for deference: The award lay "beyond the bounds of the Board's remedial discretion." *Id.*; *see also Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-578 (1988) (Board interpretation foreclosed by canon of constitutional avoidance); *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) (Board interpretation foreclosed by Bankruptcy Code); *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 40-46 (1942) (Board interpretation foreclosed by federal maritime statute).

Just as IRCA foreclosed the Board's position in *Hoffman*, the FAA forecloses the Board's position here. However broad the Board's discretion to con-

strue the NLRA may generally be, it cannot be exercised in a way that "trenches upon" another federal statute, such as the FAA. *Hoffman*, 535 U.S. at 147. Where, as here, there is only one way of harmonizing a statute with Congress's unambiguously expressed intent in another, the court, as well as the agency, is required to adopt that interpretation. *See Morton*, 417 U.S. at 551; *Scialabba*, 134 S. Ct. at 2207 (plurality opinion). Accordingly, there is no room for deference; the inquiry should end at *Chevron* Step One.

2. Deference is inappropriate for another reason: Congress has not delegated to the Board any authority to interpret the FAA. Under *Chevron*, courts may defer only to "an agency's construction of the statute *which it administers*." 467 U.S. at 842 (emphasis added). That is because deference rests on a presumption that an agency has been delegated the authority to fill in statutory gaps. *See FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). And an agency cannot claim such a delegation unless it has been "charged with the administration of the statute." *Chevron*, 467 U.S. at 865-866; *see also Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 138 n.9 (1997) (no deference where the Administrative Procedure Act "is not a statute that the Director is charged with administering"); *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990) (no deference where the Labor Secretary lacked the necessary "congressional delegation of administrative authority" to interpret the Migrant and Seasonal Agricultural Worker Protection Act).

Congress has charged the Board with administering the NLRA—and only the NLRA. *See* 29 U.S.C. § 156; *NLRB* v. *Sw. Gen., Inc.*, 137 S. Ct. 929, 937

(2017). Accordingly, this Court has declined to defer to the Board's construction of other federal laws, including maritime laws, the Bankruptcy Code, the Immigration and Nationality Act, IRCA, and the Interstate Commerce Act. *See Hoffman*, 535 U.S. at 151 n.5 (collecting cases). In *Southern S.S.*, for example, the Board ordered the reinstatement of striking sailors after concluding that their conduct did not violate a federal maritime statute, but the Court held that "the Board's interpretation of a statute so far removed from its expertise merited no deference." *Id.* at 143-144 (citing *Southern S.S.*, 316 U.S. at 40-46). Since then, the Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Id.* at 144. And the Court has continued to regard deference to "the Board's interpretation of statutes outside its expertise" as a "novel" proposition. *Bildisco*, 465 U.S. at 529 n.9.

Here, the Board's position rests not just on an interpretation of the NLRA, but also on an interpretation of the FAA. The Board attempted to "accommodate[] the policies underlying both statutes" by construing the FAA's saving clause to apply to the NLRA. *D.R. Horton*, 357 N.L.R.B. at 2284, 2287. But Congress has not charged the Board—or any other agency—with administering the FAA. The Board thus has no special role in construing the FAA or in applying this Court's FAA decisions. *See NLRB v. Int'l Bhd. of Elec. Workers, Local 340*, 481 U.S. 573, 596 (1987) (Scalia, J., concurring in the judgment) (no deference to the Board's interpretation of this Court's opinions).

For these reasons, the Court owes the Board no deference on how to harmonize the NLRA with the FAA. Rather, the Court has a duty to harmonize the two statutes in the only way that it can: by reasonably construing the NLRA as consistent with the FAA's unambiguous mandate that the class waivers be enforced.

II. IF THE FAA AND THE NLRA CANNOT BE HARMONIZED, THE FAA SHOULD BE GIVEN PRIORITY

Even if the Court is unable to harmonize the two statutes, the outcome should be the same. If the Court concludes that the FAA *unambiguously mandates* enforcement of the class waivers and that the NLRA *unambiguously prohibits* their enforcement, the two statutes would be in irreconcilable conflict; the clearly expressed intention of one would be contrary to the clearly expressed intention of the other. The question would then be which of those two contrary congressional commands should be given "priority." *Vimar*, 515 U.S. at 533. The answer is the FAA.

First, the FAA is the more specific of the two statutes. "[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton*, 417 U.S. at 550-551. Which of two statutes is the specific one depends on which "comes closer to addressing the very problem posed by the case at hand." Scalia & Garner, *supra*, at 183; *see also Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (explaining that the specific statute is the statute enacted "when the mind of the legislator [was] turned to the details of a subject" (internal quotation marks omitted)).

At a certain level, the FAA and the NLRA have comparable claims to specificity: The FAA focuses on arbitration, while the NLRA focuses on labor relations. But only the FAA discusses arbitration provisions in the context of individual employment contracts. In its very first section, the FAA exempts "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). In other words, it provides that arbitration provisions must be enforced, *id.* § 2, except in "contracts of employment of transportation workers." *Circuit City*, 532 U.S. at 119. The clear implication, as this Court has recognized, is that arbitration provisions in *other* employment contracts remain subject to the FAA. *See id.* at 114-119. Thus, in enacting the FAA, Congress focused on the very subject at hand: the use of arbitration provisions in individual employment contracts.

The same cannot be said of the NLRA, which never squarely addresses that subject. Accordingly, the FAA should control. *See United States* v. *Estate of Romani*, 523 U.S. 517, 532 (1998) (giving effect to "the more specific statute" whose "provisions are comprehensive").

Second, when Congress does want to override the FAA, it does so in the most specific language—reinforcing the conclusion that the language of the NLRA is too general to accomplish the same result. One federal statute, for example, specifies that "arbitration may be used * * * only if" certain conditions are met. 15 U.S.C. § 1226(a)(2). Other federal statutes specify that "[n]o predispute arbitration agreement shall be valid or enforceable" in a particular context. 7 U.S.C. § 26(n)(2); *see also* 12 U.S.C.

§ 5567(d)(2) (similar); 18 U.S.C. § 1514A(e)(2) (similar). And still other federal statutes specify that an agency may "prohibit" or "impose conditions or limitations on the use of" agreements to "arbitrate" certain disputes. 15 U.S.C. § 80b-5(f) (Securities and Exchange Commission); *see also* 12 U.S.C. § 5518(b) (similar authorization to Consumer Financial Protection Bureau).

Congress, in short, has restricted arbitration agreements in several discrete contexts. Each time, it has specifically mentioned arbitration agreements in the relevant statute. If Congress had wanted the NLRA to trump the FAA, one would have expected Congress to have used similarly specific language.

Third, the enforceability of class waivers forms the core of the FAA, while such waivers are at most a peripheral concern of the NLRA. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) (explaining that the NLRA does not preempt the regulation of activity that is "merely" a "peripheral concern" of the statute). The rule that arbitration provisions "shall be valid, irrevocable, and enforceable," 9 U.S.C. § 2, is the FAA's "primary" command, *Gilmer*, 500 U.S. at 24. That command has particular force when it comes to class waivers, which preserve the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. And arbitration is of "particular importance" in the employment context, where "the costs of litigation" often exceed the "smaller sums of money" at stake. *Circuit City*, 532 U.S. at 123. Indeed, "employers and employees alike may derive significant advantages" from the "relative simplicity and informality of resolving claims before arbitrators," NLRB, Gen. Counsel Memorandum No. 10-06, *supra*, at 2—which is why

"individual-arbitration agreements have become so widespread," *Murphy Oil* Pet. 24. A rule prohibiting class waivers in employment arbitration agreements would thus strike at the very heart of the FAA—contradicting the statute's "primary" command with respect to a "fundamental" provision in a wide swath of cases in which arbitration is of "particular importance."

By contrast, if the right to take part in class proceedings is a right the NLRA protects at all, it is at most a "peripheral" one. *Garmon*, 359 U.S. at 243. The "essence" of the NLRA is "[c]ollective bargaining, with the right to strike at its core." *Motor Coach Emps.* v. *Missouri*, 374 U.S. 74, 82 (1963). Rule 23 and the FLSA did not even exist when the NLRA was enacted. Giving priority to the FAA would preserve the bulk of the NLRA's protections, whereas giving priority to the NLRA would carve out a large portion of contracts from the FAA's core. Because the NLRA is the statute "whose policy and principle would be relatively less impaired by nonapplication," the FAA should prevail. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 Duke L.J. 1215, 1260 (2001).

Thus, even if the commands of the two statutes were contrary to each other, it is the command of the FAA that should take precedence. The Court should enforce the class waivers at issue.

CONCLUSION

The judgment of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgment of the Seventh Circuit in *Epic* should be reversed.

Respectfully submitted,

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Counsel for Epic Systems Corporation

JEFFREY A. SCHWARTZ
JACKSON LEWIS P.C.
1155 Peachtree Street, NE
Suite 1000
Atlanta, GA 30309

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

Counsel for Murphy Oil USA, Inc.

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

JUNE 2017

ADDENDUM

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STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, provides:

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bill of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the

refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA, 9 U.S.C. § 3, provides:

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA, 9 U.S.C. § 4, provides:

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil

action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a

default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 1 of the National Labor Relations Act (NLRA), 29 U.S.C. § 151, provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Section 2 of the NLRA, 29 U.S.C. § 152, provides:

Definitions

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United

States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the ques-

tion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

Section 6 of the NLRA, 29 U.S.C. § 156, provides:

Rules and regulations

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Section 7 of the NLRA, 29 U.S.C. § 157, provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement,

whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and

simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of

status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

* * *

Section 10 of the NLRA, 29 U.S.C. § 160, provides in pertinent part:

* * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be con-

clusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in

question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG - 9 2017
OFFICE OF THE CLERK

No. 16-285

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
PETITIONER

v.

JACOB LEWIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

DAVID C. ZOELLER
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040

DANIEL R. ORTIZ
Counsel of Record
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dro@virginia.edu

[Additional Counsel Listed on Inside Cover]

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street,
Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a joint basis in any forum are illegal because they limit the employees' right under the National Labor Relations and Norris-LaGuardia Acts to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, 102, and are therefore unenforceable under the Federal Arbitration Act, 9 U.S.C. 1 *et seq*.

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BRIEF FOR THE RESPONDENT

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set out in the appendix. App. 1a-7a.

STATEMENT

A. Statutory Background

1. In the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, Congress articulated "the policy of the United States" of "protecting the exercise by workers of full freedom of association." 29 U.S.C. 151. Section 7 of the NLRA expressly provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. This Court has described the rights under section 7 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).

The NLRA also provides that any employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" commits an unfair labor practice, 29 U.S.C. 158(a)(1), and this Court has held that the "acts which constitute the unfair labor practice [are] unlawful," *NLRB* v. *Express Publ'g Co.*, 312 U.S. 426, 436 (1941). In addition, the Norris-LaGuardia Act of 1932 (NLGA), 29 U.S.C. 101 *et seq.*, declares that employees "shall be free from the interference, restraint, or coercion of

employers * * * in * * * concerted activities for the purpose of * * * mutual aid or protection," *id.* 102, and that any contrary "undertaking or promise * * * shall not be enforceable," *id.* 103.

2. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

B. Factual Background And Court Proceedings

1. On April 2, 2014, petitioner Epic Systems Corporation (Epic), a healthcare software company, sent an email containing an arbitration agreement to some of its employees, including respondent Jacob Lewis. Pet. App. 1a-2a. The agreement required employees to bring all wage-and-hour claims through individual arbitration and stated that the employees waived "the right to participate *in* or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a. The agreement included a clause stating that if this ban was deemed unenforceable, "any claim brought on a class, collective, or representative action basis must be filed *in* a court of competent jurisdiction." *Ibid.* It also stated that employees were "deemed to have accepted this Agreement" if they "continue[d] to work at Epic." *Ibid.* "Epic gave employees no option to decline [the agreement] if they wanted to keep their jobs." *Ibid.*

2. In February 2015, Lewis sued Epic in federal court on behalf of a putative group of technical communications employees, claiming that Epic had denied them required overtime pay. Pet. App. 2a. Although the court did not notify other employees of the suit, several joined shortly thereafter. See, *e.g.*, Notice of Consent to Join Lawsuit, Ex. A, ECF No. 18 (Brittaini Maul); Notice of Consent to Join Lawsuit, Ex. A, ECF No. 14 (Charles Blackburn). Epic moved to dismiss the complaint, arguing that Lewis, through the arbitration agreement, had waived his right to bring in court any claim involving the payment of wages and any right to participate in joint actions. Pet. App. 2a, 24a. Lewis responded that the agreement was unenforceable because, among other reasons, it interfered with his and his coworkers' right to engage in "concerted activities" under section 7 of the NLRA. *Id.* at 2a-3a. He also argued that pursuant to the arbitration agreement's own saving clause his class suit was properly brought in federal court. *Id.* at 25a. The district court agreed. *Id.* at 28a.

3. The Seventh Circuit unanimously affirmed. The court noted first that section 7 of the NLRA provides that "[e]mployees shall have the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection"; that section 8 "enforces Section 7 unconditionally by deeming that it 'shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]'"; and that "the [National Labor Relations] Board [(NLRB)] has, 'from its earliest days,' held that 'employer-imposed, individual agreements that purport to restrict Section 7 rights' are unenforceable" and "has

done so with 'uniform judicial approval.'" Pet. App. 3a-4a (citations omitted; first brackets in original). "[B]oth courts and the [NLRB]," the court added, "have held that filing a collective or class action suit constitutes 'concerted activit[y]' under Section 7." *Id.* at 4a.

"Section 7's text, history, and purpose," the court argued, "support this rule." Pet. App. 5a. "Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities,'" *ibid.*, the relevant statutory term, and "[t]he NLRA's history and purpose confirm that the phrase * * * should be read broadly to include resort to representative, joint, collective, or class legal remedies," *id.* at 6a. The court alternatively held that "even if Section 7 *were* ambiguous—and it is not"—the NLRB's interpretation is "entitled to *Chevron* deference." Pet. App. 7a.

With these legal principles established, the court determined that "[t]he question thus becomes whether Epic's arbitration provision impinges on 'Section 7 rights.' The answer is yes." Pet. App. 9a. The collective action ban, it held, "runs straight into the teeth of Section 7" and is therefore "unenforceable." *Id.* at 10a.

The court then turned to the FAA. It first rejected Epic's argument that the "FAA trumps the NLRA." Pet. App. 12a. "[T]his argument," the court noted, "puts the cart before the horse." *Id.* at 13a. As the court explained, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Ibid.* Because the FAA's own saving clause forecloses arbitration

> 'upon such grounds as exist at law or in equity for the revocation of any contract' [and i]llegality is one of those grounds[, a] contract provision[] like Epic's, which strip[s] away employees' rights to engage in 'concerted activities' * * * is illegal, and meets the criteria of the FAA's saving clause for nonenforcement.

Id. at 15a (internal citation omitted).

Then the court rejected Epic's argument that section 7's right to collective action "is procedural only, not substantive, and thus the FAA demands enforcement." Pet. App. 20a. "The right to collective action," it stated, "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute." *Ibid.* In fact, it held, "Section 7 is the NLRA's *only* substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects." *Id.* at 21a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the right to engage in "concerted activities" guaranteed by section 7 of NLRA includes joint legal action and that any contract that violates this right is illegal. It also correctly held that that this illegal contract could not be resuscitated by requiring an employee to sign an arbitration agreement.

I. Section 7 of the NLRA grants employees a broad right to pursue joint legal action. Employees have the right, it states, "to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157. In particular, this Court has explained that section 7 protects the right to "seek to improve

working conditions through resort to administrative and judical forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). Courts and the NLRB have consistently held that section 7 includes the right to jointly pursue work-related legal claims.

The text, purpose, and history of section 7 strongly support this judicial consensus. The plain meaning of "concerted activities" undoubtedly includes joint legal activities. Indeed, courts have read "concerted activities" broadly to protect many individual employee actions even when "the employee alone may have an immediate stake in the outcome." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975). The NLRA's legislative history, moreover, supports this common-sense interpretation of section 7's text.

In addition, the NLRA's underlying purpose compels a reading of "concerted activities" that includes joint legal action. This Court has recognized that section 7 was passed "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984). Joint legal action advances this purpose by enabling employees to jointly seek those protections that law gives them. This purpose is made particularly clear by the history of the NLRA and the NLGA. Both statutes were enacted specifically to give employees the ability to band together in a wide variety of ways, including through legal action, a means less confrontational and disruptive to the employer-employee relationship than traditional economic weapons, like striking.

Consistent with the NLRA's plain language, purpose, and history, the NLRB has interpreted

section 7 to protect joint legal action, stating unambiguously that "the substantive right to engage in concerted activity * * * through litigation or arbitration lies at the core of the rights protected by section 7." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2281 (2012) (*Horton I*). This longstanding and consistent interpretation is entitled to deference.

Section 8 of the NLRA renders unlawful any contract that violates the rights granted by section 7. This section asserts that "[i]t shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. 158. By forcing employees to sign an agreement which "interfere[d] with, restrain[ed], [and] coerce[d]" their "exercise of the rights guaranteed in section [7,]" Epic engaged in an illegal "unfair labor practice." *Ibid.* The ban against joint legal action thus violates federal law and federal courts cannot enforce it.

II. Nothing in the FAA revives Epic's ban. First, even if the FAA were applicable, its own terms would preclude enforcement. The Act provides three grounds for doing so: (1) its saving clause, (2) the prospective waiver doctrine, and (3) a contrary congressional command as shown by congressional intent. All three grounds bar enforcement here.

The FAA's saving clause provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds * * * for the revocation of any contract." 9 U.S.C. 2. It recognizes that the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg.*

Co., 388 U.S. 395, 404 n.12 (1967). Hence, where arbitration contracts are subject to "generally applicable contract defenses," *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted), such as illegality, the FAA prevents enforcement to avoid offering *extra* protection.

Epic's ban is illegal because it "interfer[es]" with employees' right to pursue joint action in violation of the NLRA and NLGA. 29 U.S.C. 102; 158(a)(1). Thus, the FAA's saving clause renders it unenforceable. This illegality defense is "generally applicable," moreover, because it rests on Epic's forbidding *all* forms of joint legal action. It does not target arbitration.

Epic's ban also violates the prospective waiver doctrine, which nullifies specific terms in "arbitration agreements that 'operat[e] . . . as a prospective waiver" of core federal statutory rights. See *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (citation omitted). The doctrine patently applies to Epic's ban, which not only conflicts with federal statutes, but also infringes the right *most* central to their purposes.

The NLRA and NLGA also represent a strong signal from Congress that courts should not uphold joint-action bans. Although arbitration agreements are generally enforced "according to their terms," *Italian Colors*, 133 S. Ct. at 2309, "th[at] mandate may be overridden by a contrary congressional command" evidenced by a statute's text, its legislative history, or "an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226-227 (1987).

There is certainly such a command here. The NLRA's and NLGA's text, history, and purposes unambiguously conflict with contract terms, such as Epic's, that ban employees from "band[ing] together," *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984), "for the purpose of * * * mutual aid or protection," 29 U.S.C. 157. No magic words are required.

Lastly, the employers read this Court's contrary-congressional-command jurisprudence so narrowly, allowing only specific and emphatic textual directives to count, that they would require enforcement of *any* arbitration provision, even one violating another federal statute, so long as that statute failed to reference arbitration specifically. Not only is this outcome absurd, but it would also render arbitration agreements substantially *more* enforceable than other contracts.

In sum, Epic's ban against joint legal action is unlawful under both the NLRA and NLGA. Further analysis is unnecessary since courts cannot enforce illegal contract provisions. Even were the FAA relevant, however, it would foreclose enforcement by its own terms.

ARGUMENT

I. Epic's Joint-Action Ban Is Unlawful Under Sections 7 & 8 Of The NLRA

The Seventh Circuit correctly determined that section 7 of the NLRA grants employees a substantive right to pursue joint legal actions. Both the plain language and purpose of the NLRA, as well as this

Court's and the NLRB's interpretations of section 7, support this conclusion.

A. The Plain Text Of Section 7 Encompasses A Right To Joint Legal Action

Section 7 provides: "Employees have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities* for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157 (emphasis added). This Court has explained that section 7's protections cover employees' "seek[ing] to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978).[1] Both lower courts and the NLRB have consistently held that section 7 includes a right to jointly pursue work-related legal claims. See, *e.g.*, *Brady* v. *Nat'l Football*

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[1] Employers and their amici try to minimize *Eastex*'s implications by arguing that in a footnote the Court effectively reserved "the question of what may constitute 'concerted' activities in this context." Pet. Br. 36-37 (Epic Br.) (quoting *Eastex*, 437 U.S. at 566 n. 15) ; Pet. Br. 27, *Ernst & Young LLP* v. *Morris*, No. 16-300 (June 9, 2017) (E&Y Br.) (same); U.S. Amicus Br. 24 n.3 (same). That is mistaken. Concertedness was not contested in the case. The Court made the remark only to avoid appearing to approve the particular legal theories of concertedness adopted by the Board and the lower courts in the cases it cited as supporting its view of "mutual aid or protection." In any event, the Court made clear in the very next sentence that joint legal action could meet both the "concertedness" and "mutual aid or protection" requirements of section 7 when it noted that "to hold that activity of this nature is entirely unprotected * * * would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act." 437 U.S. at 566.

League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the [NLRA]."); *Altex Ready Mixed Concrete Corp.* v. *NLRB*, 542 F.2d 295, 296-297 (5th Cir. 1976) (similar); *Leviton Mfg. Co.* v. *NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

The judicial consensus favoring a right to engage in joint legal action is unsurprising given the plain language of section 7. This Court has instructed that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). When interpreting a statute's language, the Court "giv[es] the words used their ordinary meaning." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (quoting *Moskal* v. *United States*, 498 U.S. 103, 108 (1990)).

Joint legal action fits easily within the ordinary meaning of "concerted activities." "Concerted" means "jointly arranged, planned, or carried out; coordinated." *New Oxford American Dictionary* 359 (3d ed. 2010); see also *Webster's Third New International Dictionary* 470 (Gove ed., 2016), (defining "concerted" as "performed in unison"). "Activities" are "thing[s] that a person or group does or has done" or "actions taken by a group in order to achieve their aims." *New Oxford American Dictionary* at 16. Similarly, *Black's Law Dictionary* defines "concerted activity" as "[a]ction by employees concerning wages or working conditions; esp., a conscious commitment to a common scheme designed

to achieve an objective." *Black's Law Dictionary* 349 (Garner ed., 10th ed. 2014). These meanings have remained essentially the same since the NLRA's enactment. See *Webster's New International Dictionary of the English Language* 553 (2d ed. 1936) (defining "concert"); *id.* at 27 (defining "activity"); *Black's Law Dictionary* 385 (3d ed. 1933) (defining "concerted action").

Additionally, the definition of "concerted activities" must include something beyond "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of [employees'] own choosing." 29 U.S.C. 157. Otherwise, the statute's next phrase, "to engage in *other* concerted activities," *ibid.* (emphasis added), would be rendered superfluous. This Court has repeatedly "hesita[ted] to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Employers invoke the canon of *ejusdem generis* in an attempt to narrow the broad reach of section 7. See Epic Br. 33; E&Y Br. 27. Ernst & Young argues that this canon limits section 7's "other concerted activities" to only "self-organization and collective bargaining," *ibid.*, while Epic argues that it limits "other concerted activities" to actions "that employees can engage in either on their own or with the involvement of no one other than their employers," Epic Br. 34. Both arguments fail.

Ernst & Young misapplies the canon by reading the final clause as practically identical to the preceding

ones. In Ernst & Young's view, "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," merely restates the general category established by the preceding ones: "self-organization and collective bargaining." E&Y Br. 27. As this Court has held, however,

> [i]f the particular words exhaust the [class], there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose.

United States v. *Mescall*, 215 U.S. 26, 31-32 (1909); see also *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Unless the final six words, "or other mutual aid or protection," 29 U.S.C. § 157, have no meaning, then, they must encompass more than what Ernst & Young allows.

This Court has, in fact, already rejected Ernst & Young's position. In *Eastex*, the Court held, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining [and] recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat *broader* purpose of 'mutual aid or protection' as well as for the *narrower* purposes of 'self-organization' and 'collective bargaining.'" 437 U.S. at 565 (emphasis added). It then specifically noted that the NLRB and lower courts "have held that the 'mutual aid or protection' clause protects employees * * * when they seek to improve working conditions

through resort to administrative and judicial forums." *Id.* at 565-566. Although, it is true, the Court did not specifically "address the question of what may constitute 'concerted' activities in this context," see pp. 10 n.1, *supra*, it did hold that finding "activity of this nature [to be] entirely unprotected," as the employers would here, "would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions," 437 U.S. 566-567 (quotations omitted). It thus rejected the idea "that Congress could have intended the protection of § 7 to be as narrow as [the employer] insists." *Id.* at 567.

Epic's more novel argument succumbs to a different difficulty. It proves incoherent—and too much. First, "self-organization, * * * form[ing] labor organizations, [and] bargain[ing] collectively through representatives of their own choosing," all activities section 7 expressly protects, are hardly things "that employees just *do*," Epic Br. 34 (quoting *NLRB* v. *Alt. Entm't, Inc.*, 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J. concurring in part and dissenting in part)), let alone by themselves or with only the aid of their employers. To certify a union as their exclusive bargaining representative, for example, employees must typically first petition the NLRB. See 29 U.S.C. 159(c)(1)(A). If the NLRB finds after investigation that "a question of representation exists," *id.* 159(c)(1), and determines that the employee group represents an appropriate "bargaining unit," *id.* 159(b), it then "direct[s] an election through secret ballot," *id.* 159(c)(1), which it conducts itself, 29 C.F.R. 102.69(a). The employer can then contest the petition before the NLRB, 29 C.F.R. 101.30, and, if the

employees are ultimately successful, the election result itself, 29 C.F.R. 102.69(c)(1)(ii). And, if the NLRB rules against the employer at either stage, the employer can challenge the decision in court. 29 U.S.C. 160(f). In a typical case, then, forming a union requires the participation of not only the employees, but also the employer, the NLRB, and the courts. The "concerted activities" specifically and individually mentioned in section 7, in other words, often require more extensive participation by third-parties than filing a joint law suit. If, as Epic contends, section 7 excludes activities that require the participation of "third parties," Epic Br. 34, it necessarily excludes "form[ing] labor organizations," one of the NLRA's express core rights. That makes no sense.

Understanding section 7 to protect joint legal action makes particular sense given how broadly this Court has defined "concerted activities" in related labor contexts. This Court has stated that section 7's protection "clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). As such, this Court has held that "concerted activities" can include even a single employee bringing a complaint in his *individual* capacity to protect his own rights simply because those rights arose out of a collective bargaining agreement. *Id.* at 832. Likewise, this Court has explained that "the literal wording" of section 7 "clearly" encompasses an individual union member's right to have a union representative present at an informal hearing he worries may lead to discipline. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 254-256, 260 (1975). "This is true even though the employee *alone* may have

an immediate stake in the outcome." *Id.* at 260 (emphasis added). If section 7's "concerted activit[y]" protections are so broad as to protect individuals acting alone and only for themselves, they are clearly broad enough to include *joint* legal action taken to benefit themselves as a group.

The NLRA's legislative history supports this common-sense understanding of section 7's plain text. The NLRA's principal author—Senator Robert F. Wagner—explained that "[s]till less open to question is the proposition that workers also should be allowed to cooperate fully. * * * In order that the strong may not take advantage of the weak, every group must be equally strong." 78 Cong. Rec. 12,017 (1934) (referencing S. 2926, a predecessor to the NLRA). Senator Wagner also testified that the Act's unfair labor practices should be articulated "without in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom." *Hearings Before the Senate Comm. on Educ. & Labor on S. 1958*, 74th Cong., 1st Session 38 (1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949). Joint legal action, which allows employees to protect themselves and improve their condition, therefore fits easily within Congress's intentions for section 7's protections. Employees who can pursue legal action jointly will fear employer retaliation less and be able to share the costs with others.

B. The NLRA's Underlying Purpose Supports An Inclusive Interpretation Of "Concerted Activities"

The NLRA's underlying purpose further supports interpreting "concerted activities" to include joint legal action. The best source to discover Congress's purpose is the statute itself. The Act's declaration of policy states:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce * * * by protecting the exercise by workers of full freedom of association* * * for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. 151. A protection as broad as "full freedom of association" certainly includes the right to joint legal action. And joint suits involving wage-and-hour claims—such as this one, Epic Pet. App. 2a—fall within the comprehensive umbrella of "mutual aid or protection." They seek to jointly vindicate rights gained through legislation or bargaining.

Congress enacted section 7 "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *City Disposal*, 465 U.S. at 835. Joint legal actions level the playing field exactly in the way. By lessening fear of employer retaliation and spreading the cost of seeking vindication, employees' banding together allows them

to improve their condition. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 809 (1985) (explaining that class action procedures allow plaintiffs who otherwise would "have no realistic day in court" to enforce their rights). This Court has found, moreover, "no indication that Congress intended to limit [section 7's] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *City Disposal*, 465 U.S. at 835. The Court continued: "[W]hat emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process." *Ibid.* Adopting this Court's inclusive understanding of section 7, the court below appropriately concluded that "other concerted activities" include joint legal action. Pet. App. 4a-7a.[2]

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[2] Epic argues that since "in a judicial or arbitral forum[] outcomes are not dependent on whether claims are heard as a class or individually," joint proceedings "do not serve the purpose of the right to engage in 'concerted activities' and thus should not be protected under section 8." Epic Br. 43-44. Although Epic may be correct that the number of employees joining in a dispute does not affect how a court or arbitrator ultimately *decides* the issue, it certainly affects whether the employees can and do *present* the issue for decision. As many have noted, unless employees can share the cost of dispute resolution by proceeding through joint action, it is simply irrational for them to arbitrate or litigate many claims. See Daniel T. Deacon, *Agencies and Arbitration*, 117 Colum. L. Rev. 991, 992 & nn.1-2 (2017) (collecting authorities). They may also fear retaliation and decline to challenge their employers unless they can band together, which makes retaliation more difficult.

C. The NLRA's Enactment History Confirms That Congress Intended Section 7 To Protect Employees' Joint Legal Activity

The context of the NLRA's enactment offers yet more support that section 7's protected "concerted activities" include joint legal action. The text, purpose, and history of the NLGA, 29 U.S.C. 102 *et seq.*, for example, provide such support. Enacted three years before the NLRA, the NLGA established the right to joint action as the basic premise of national labor policy. As Senator Wagner explained to the Senate Committee on Education and Labor, "[t]he language [of section 7 of the NLRA] follows practically verbatim the familiar principles already embedded in our law by * * * section 2 of the [NLGA]." *Hearings Before the Senate Comm. on Educ. and Labor on S. 1958*, 74th Cong., 1st Sess. 38 (1935), *reprinted in* 1 NLRB, *Legislative History of the National Labor Relations Act 1935* 1414 (1949); see also *City Disposal*, 465 U.S. at 834-835 ("[Section 2 of the NLGA] was the source of the language enacted in § 7 [of the NLRA]."); *Eastex, Inc.* v. *NLRB*, 437 U.S 556, 565 n.14 (1978) ("Congress modeled the language of § 7 after that found in § 2 of the [NLGA.]"). Section 2 of the NLGA declares the following to be the "public policy of the United States":

> Whereas * * * the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment * * * it is necessary that he have full freedom of association [and] be free from the interference, restraint, or coercion of employers * * * in self-organization or in *other*

> *concerted activities* for the purpose of * * * mutual aid or protection.

29 U.S.C. 102 (emphasis added). Section 3 enforces this policy by requiring that "any other undertaking or promise in conflict with the public policy declared in [section 2] * * * shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. 103. The NLGA and NLRA thus protect employees' right to engage in "concerted activities" in two distinct yet complementary ways. First, sections 2 and 3 of the NLGA prohibit federal courts from enforcing contracts that interfere with, restrain, or coerce employee concerted activity. Second, sections 7 and 8 of the NLRA extend this protection by declaring any employer interference, restraint, or coercion of employee concerted activity an "unfair labor practice." 29 U.S.C. 158(a)(1).

The language and structure of sections 2 and 3 make clear that Congress intended the NLGA—and thus the NLRA—to protect a broad class of "concerted activities," including joint legal action. As explained above, joint legal action fits easily within the ordinary meaning of "concerted activities." See pp. 10-16, *supra*. Section 3, moreover, prohibits federal courts from enforcing *two* categories of contracts: (1) "[a]ny undertaking or promise, such as is described in this section"; and (2) "any *other* undertaking or promise in conflict with the public policy declared in section [2]." 29 U.S.C. 103 (emphasis added). The "undertaking[s] or promise[s] * * * described in this section" are promises not to join or remain in a labor organization, which section 3 explicitly proscribes. *Ibid.* Thus, the

second category of unenforceable contracts—those which *otherwise* conflict with the public policy of section 2—necessarily refers to agreements interfering with a broader class of concerted activities than membership in a labor organization.

Section 4 of the NLGA, which identifies specific acts that are not subject to restraining orders or injunctions, provides additional textual support for interpreting "concerted activities" to include joint legal action. Section 4 states:

> No court of the United States shall have jurisdiction to issue any * * * injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute * * * from doing, *whether singly or in concert*, any of the following acts:
>
> * * *
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against, *or is prosecuting, any action or suit in any court of the United States or of any State.*

29 U.S.C. 104 (emphasis added). While the NLGA does not expressly define the activities listed in section 4 as "concerted activities," the character of the activities protected implies that they are specific types of concerted activity encompassed by section 2's public policy. Other activities explicitly protected by section 4 include striking, joining labor organizations, and assembling peaceably to promote collective interests in a labor dispute—all indisputable forms of concerted activity protected by the NLRA and NLGA. See 29

U.S.C. 104(a), (b) and (f). Section 4(d) therefore demonstrates that Congress intended section 2's protection to encompass certain concerted legal activities. Any protection of the right to "*aid*" persons involved in legal actions arising from labor disputes must *a fortiori* protect the right to *join* in bringing such actions since that is the most helpful and direct form of "aid" available. As a result, section 4(d) makes clear that joint legal action, like striking or joining a labor organization, is a form of concerted activity protected by both section 2 of the NLGA and section 7 of the NLRA.[3]

The NLGA's underlying purpose also supports this interpretation of "concerted activities." Congress enacted sections 2 and 3 of the NLGA in response to widespread judicial enforcement of "yellow dog contracts" that prospectively waived the right to various forms of concerted activity. See *Iskanian* v. *CLS Trasp. L.A., LLC*, 327 P.3d 129, 159-162 (Cal. 2014) (Werdegar, J., concurring in part and dissenting in part); see also *Lincoln Fed. Labor Union No. 19129* v. *Nw. Iron & Metal Co.*, 335 U.S. 525, 534 (1949) (explaining the historical conditions that "prompted

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[3] Epic's reading of section 4 of the NGLA is extremely puzzling. In its view, "[w]hat Congress had in mind [in section 4] was employees helping one another by, for instance, 'sending money' to litigants—something employees can do of their own accord" without involving "a tribunal or employer." Epic Br. 38-39 (omitting citations). But it defies common sense to think that Congress would specifically protect an employee's sending money to a co-employee to support her law suit against their common employer and not protect his right to file a joint legal action together with her concerning the same dispute. This is *Hamlet* without the prince.

passage of state and federal laws to ban employer discrimination against union members and to outlaw yellow dog contracts"). While most people now associate the term "yellow dog contract" with prospective waiver of an employee's right to join a union, at the time of the NLGA's enactment the term was generally understood to encompass prospective waivers of a far broader class of concerted activity. See Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 10-17 (2014). Indeed, the term was first applied not to unionization waivers, but to company housing leases prohibiting anyone other than the employee's immediate family, doctors, or morticians from having access to his home. U.S. Coal Comm'n, *Report of the United States Coal Commission* 169-170 (1923). When Congress passed the NLGA, moreover, the term was understood to include prospective bars of joint *legal* action. See Joel I. Seidman, *The Yellow Dog Contract* 58 (1932) (discussing an employer-mandated promise to "adjust all differences by means of individual bargaining" as an example of a yellow dog contract).

The NLGA's legislative history confirms that Congress was well aware of the breadth of contractual limitations on employee concerted activity and sought to bar enforcement of all such agreements. In describing the types of contracts rendered unenforceable by section 3, the Senate Report explains: "Not all of these contracts are the same, but, in general, the conditions are such [that] the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, 72d Cong., 1st Sess. 14 (1932). The House

Report describes such contracts in equally broad terms: "[T]he character of contract condemned * * * prevents a man from joining with his fellows for collective action." H. R. Rep. No. 72-669, 72d Cong., 1st Sess. 7 (1932). Similarly, in debate, Senator George W. Norris—the Act's co-sponsor—described the contracts rendered unenforceable by section 3 as those in which an "employee waives his right absolutely to free association * * * in connection with his * * * conditions of employment." 75 Cong. Rec. 4,504 (1932). Senator Norris further explained that the agreements proscribed include contracts requiring employees to "singly present any grievances [they have]." *Ibid.* The NLGA's legislative history—like its plain language and purpose—thus confirms Congress's intent to protect joint legal action as "concerted activities." Nothing in the NLRA suggests that Congress intended to limit the scope of protected activities when it adopted the same language in section 7 of the NLRA.

The right to joint legal action guaranteed by the NLRA and NLGA is critical to both Acts' structures. Without the joint action guarantees at the heart of these laws, the statutes would lack practical meaning. Congress passed these statutes to enable employees "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc.* v. *NLRB*, 437 U.S 556, 565 (1978). It recognized that there is no freedom of contract between "a single workman[] with only his job between his family and ruin" and "a tremendous organization having thousands of workers." 78 Cong. Rec. 3,679 (statement of Sen. Wagner) (1934). The

Acts were not designed to regulate the minute details of employee-employer interactions, but rather to allow for joint action so that "the strong may not take advantage of the weak." 78 Cong. Rec. 12,017 (statement of Senator Wagner).

The Acts, moreover, protect collective action rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to jointly resolve workplace disputes in an adjudicatory forum critically serves that purpose. Joint pursuit of legal remedies has far less potential for economic disruption than many indisputably protected concerted activities, like strikes and boycotts. Denying employees the safety valve of joint legal action, like denying them the safety valve of walking out in protest of working conditions, "would only tend to frustrate the policy of the [NLRA]." *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

D. The NLRB's Interpretation Of Section 7 Is Entitled To Deference

The NLRB, furthermore, has long and consistently interpreted section 7 to include a right to engage in joint legal action, and the Board's interpretation is entitled to deference. This Court has "often reaffirmed that the task of defining the scope of § 7 'is for the [NLRB] to perform in the first instance as it considers the wide variety of cases that come before it.'" *City Disposal*, 465 U.S. at 829 (quoting *Eastex*, 437 U.S. at 568) (noting also that the NLRB's interpretations of

ambiguous provisions of the NLRA are entitled to "considerable deference").[4]

For more than seventy years, the NLRB has consistently interpreted the NLRA to protect joint legal action—whether in court or arbitration. The interpretation stems from *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948-949 (1942), decided shortly after the passage of the NLRA, where the NLRB held that "the filing of a [FLSA] suit by three employees was protected concerted activity." *Horton I*, 357 N.L.R.B. at 2278; see also *127 Rest. Corp.*, 331 N.L.R.B. 269, 275 (2000) ("[T]he filing of a civil action by employees is protected activity unless done with malice or in bad faith."); *52nd St. Hotel Assocs.*, 321 N.L.R.B. 624, 633 (1996) ("48 * * * employees * * * join[ing] together to seek legal redress for their wage claims [are] engaged in protected, concerted activity under Section 7."); *Health Enters. of Am., Inc.*, 282 N.L.R.B. 214, 218 (1986) (holding that a group of employees' "filing a civil lawsuit against" an employer is "concerted activity"); *Clara Barton Terrace Convalescent Ctr.*, 225 N.L.R.B. 1028, 1033 (1976) ("It is * * * well settled that the advancement of a collective grievance is protected activity.").

E. Bans Against Joint Legal Action Violate Section 8(a)(1) Of The NLRA And Are Therefore Unlawful

While section 7 of the NLRA establishes a right to joint legal action, the Act's enforcement provision,

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[4] To be clear, the NLRB is entitled to deference only on its interpretation of the NLRA, a statute which it administers. There is no need to defer to the NLRB's interpretation of the FAA or the NLGA, nor has the Board requested such deference.

section 8, renders contractual provisions that violate that right unlawful. Section 8 provides: "It shall be an unfair labor practice for an employer * * * to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. 158(a)(1). The plain text of section 8, as well as this Court's and lower courts' precedents, make clear that contracts requiring employees to forswear the possibility of joint legal action as a condition of continued employment are unlawful.

To "interfere" means "to come in collision[;] to be in opposition[;] to run at cross-purposes[;] clash," or "to enter into or take a part in the concerns of others[;] intermeddle, interpose, intervene." *Webster's Third New International Dictionary, Unabridged* 1178 (Gove ed., 2016) (some words capitalized in original). This meaning has not changed since Congress first enacted the NLRA. See *Webster's New International Dictionary of the English Language* 1294 (2d ed. 1936) (defining "interfere" as "[t]o come in collision; to clash; also, to be in opposition; to run at cross-purposes"; "[t]o enter into, or take a part in, the concerns of others; to intermeddle; interpose; intervene"). Similarly, to "restrain" has not varied in definition. Compare *Webster's Third New International Dictionary Unabridged* 1936 (Gove ed., 1993) (defining "restrain" as "to hold (as a person) back from some action, procedure, or course[;] prevent from doing something"; "to limit or restrict to or in respect to a particular action or course[;] keep within bounds or under control"; "to moderate or limit the force, effect, development, or full exercise of"; "to keep from being manifested or performed[;] repress") (some words capitalized in original), with *Webster's New*

International Dictionary of the English Language 2125 (2d ed. 1936) ("To draw back again; to hold back; to check; to keep in check; to hold back from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle; to repress or suppress; to curb."). Finally, to "coerce" was defined at the passage of the NLRA as "[t]o constrain or restrain by force, esp. by law or authority; to repress; curb," or "[t]o compel to any action," *id.* 519, and today holds the same meaning, see *Webster's Third New International Dictionary, Unabridged* 439 (Gove ed., 1993) (defining "coerce" as "to restrain, control, or dominate, nullifying individual will or desire (as by force, power, violence, or intimidation)"; "to compel to an act or choice by force, threat, or other pressure"). Section 8 thus plainly makes illegal any agreement that preconditions continued employment on the waiver of section 7 rights.

Consistent with section 8's plain text, this Court's precedent makes clear that requiring individuals to prospectively waive section 7 rights is illegal. This Court has held that contracts that "stipulate[] for the renunciation by the employees of rights guaranteed by the [NLRA]" are illegal. *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 361 (1940). In *National Licorice Co.*, for example, this Court held that individual contracts in which employees waived their right to present grievances "in any way except personally" were unenforceable as "a continuing means of thwarting the policy of the [NLRA]." *Id.* at 360-361. The Court further explained in *J.I. Case Co.* v. *NLRB* that "[w]herever private contracts conflict with [the NLRB's] functions, they obviously must yield or the [NLRA] would be reduced to a futility." 321 U.S. 332,

337 (1944); see also *ibid.* ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA].").

Epic tries to spin these two cases as inapposite.[5] Epic Br. 46-47. *Nat'l Licorice*, it surmises, rested on a finding that the contracts the employer made with its individual employees "were not truly voluntary." *Id.* at 46. That is odd. The Court never described the individual contracts as such. See 309 U.S. at 360.

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[5] The United States also tries to duck the implications of these cases by arguing that "both decisions were highly dependent on a key factual feature that is absent here." U.S. Amicus Br. 28. Both, it claims, concerned agreements "adopted to eliminate the Union as the collective bargaining agency of [the] employees," *ibid.*, a "concern" that "the present cases do not implicate," *id.* at 29. The very first sentence of *Nat'l Licorice* itself, however, describes its holding in broader terms that do not turn on this "key factual feature": "the question[] presented [is] whether the Board has the authority to order an employer not to enforce contracts with its employees, found to have been procured in violation of the National Labor Relations Act and to contain provisions violating that act." 309 U.S. at 351. And in *J.I. Case*, this Court restated its holding in *Nat'l Licorice* without even mentioning this purported "key factual feature"—" We have * * * held that individual contracts obtained as the result of an unfair labor practice may not be the basis of advantage to the violator of the Act nor of disadvantage to employees. *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350."—and then proceeded to apply that broader holding again without mentioning this feature: "Wherever private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility." *Id.* at 337. The "factual feature" the United States points to, in short, may help explain why the particular contracts in those cases violated the NLRA but it does not serve to arbitrarily limit the kinds of violations that count.

Instead it identified three different and specific ways in which the individual contracts "by their terms * * * imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by § 7 and 8 of the Act." *Ibid.* Their illegality, not any question of their voluntariness, was the reason the Court did not permit them to be enforced.

Epic's take on *J.I. Case*, 321 U.S. 332, is odder still. Epic contends that it is inapposite because it "involved a collective-bargaining agreement governing *substantive* benefits relating to work and pay." Epic Br. 46 (emphasis added). "The issue," it claims, "was whether an individual contract could [waive] those benefits, and the Court answered no." *Ibid.* The case, however, involved no "collective-bargaining agreement," let alone one "governing *substantive* benefits related to work and pay." Since the employer had cited the individual contracts as a reason why it could not even negotiate with the union over terms the individual contracts covered, no collective-bargaining agreement was ever reached. 321 U.S. at 334 ("The union then asked the Company to bargain. It refused, declaring that it could not deal with the union in any manner affecting rights and obligations under the individual contracts."). Rather, the Court invalidated the contracts because "[i]ndividual contracts * * * may not be availed of to defeat or delay the *procedures* prescribed by the National Labor Relations Act." *Id.* at 337 (emphasis added). An individual contract, it held, could not interfere with the core protections of the NLRA, even if they concerned "procedures."

Throughout their briefs, the employers work hard in an attempt to distinguish substantive from

procedural NLRA rights. The latter can be waived, they claim,[6] *e.g.*, Epic Br. 10, 30, 44-47; E&Y Br. 45-48, and, in any event, are overridden by the FAA, *e.g.*, Epic Br. 39-42. As this Court held in *J.I. Case*, however, the characterization of core section 7 rights as procedural or substantive makes no difference. A contract that conflicts with a core section 7 right is a nullity, no matter how one characterizes it. That makes perfect sense. After all, nearly all the core protections of section 7, including ones that the employers themselves believe cannot be individually waived or displaced by the FAA, like collective bargaining, see, *e.g.*, *id.* at 34 (arguing that specific terms in section 7, like "bargaining collectively," are protected), are "procedural" in some sense. Collective bargaining is no more "substantive" than joint legal

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[6] The employers' waivability argument rests on a flawed syllogism. They reason that since "[e]mployees may validly waive their right to class proceedings in agreements reached through collective bargaining," and "'[n]othing * * * suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative,'" Epic Br. 44-45 (quoting *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009)), then individuals may waive their rights to joint legal action as well. The syllogism's secondary premise, however, is mistaken. In context, the Court in *Penn Plaza* was saying only that whatever section 7 rights an individual employee could waive a union could also waive through collective bargaining. That makes sense. But its converse—whatever section 7 rights a union can waive through collective bargaining an individual may as well—does not, as this Court has repeatedly held. See, *e.g.*, *J.I. Case*, 321 U.S. at 337 (holding that "[i]ndividual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA.] * * * Wherever private contracts conflict with [the NLRA], they obviously must yield or the Act would be reduced to a futility").

action. It is a procedural mechanism through which employees can better bargain for "substantive benefits related to work and pay." *Id.* at 46. In that respect, it resembles core constitutional procedural protections, like freedom of association, that allow individuals to band together to achieve their ends.

Nearly all the arguments employers make against the centrality of joint legal action, in fact, could be made just as easily against collective bargaining itself. Collective bargaining, just like joint legal action, often requires participation—indeed, more participation—by "third-parties," like agencies and courts. See pp. 14-15, *supra*. And the substantive fruits of collective bargaining, just like those of joint legal action, can be achieved—albeit to a much smaller degree—through individual action. See, *e.g.*, Epic Br. 41 (arguing that an employee can waive a procedure that might be necessary to ensure "effective vindication" of substantive rights). Under the employers' reasoning, in fact, a waiver of collective bargaining itself "would leave employees free to work together at every step of the [bargaining] process." Epic Br. 40. In Epic's words, "[e]mployees [could] cooperate in hiring [the same bargaining agent], drafting their [bargaining demands], developing their [bargaining] strategies, finding and preparing [experts], [and]writing [bargaining proposals]," all while bargaining individually with their employer. *Ibid.* (replacing legal action terms in original quotation with collective bargaining ones). "To be sure," as Epic puts it, "a [collective-bargaining] waiver may channel [employees'] 'concerted activities' into a different *procedural* form, but their exercise of the substantive right remains the same." *Ibid.* (same). In short, the

employers cannot displace joint legal action from section 7 without displacing collective bargaining itself. In their view, doing either would merely "channel[] concerted activities into individual [proceedings.]" Epic Br. 39 (emphasis deleted). That is an argument too far.

Also, although, as employers and their amici repeatedly argue, modern Rule 23 class-action litigation and FLSA class proceedings developed after the FAA was enacted, see, *e.g.*, Epic Br. 32, they are wrong to conclude that the NLRA and NGLA cannot therefore protect joint legal proceedings. At the time both the NLRA and NGLA were enacted, of course, federal law recognized joint legal action. Indeed, it had done so since the beginning of the federal court system. The first case docketed in this Court, for example, *Van Staphorst* v. *Maryland*, 2 U.S. (2 Dall.) 401 (1791), concerned a suit by two brothers against the state of Maryland. Likewise, the one civil jury trial this Court has held in its history concerned a suit over a debt involving multiple defendants. *Georgia* v. *Brailsford*, 3 U.S. (1 Dall.) 1 (1794). The employers' joint-action bars would, of course, make impossible traditional actions like these involving more than one plaintiff or more than one defendant—in court or in arbitration. Although the NLRA and NLGA protect appeals to forms of joint legal action fashioned after their enactment, the employers' position sweeps much more broadly. It would invalidate the most traditional and long-standing forms of legal action, not just two particular forms developed more recently.

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As this Court has explained, "our cases leave no doubt that illegal promises will not be enforced in cases controlled by federal law." *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 77 (1982). "Where the enforcement of private agreements would be violative of [federal] policy, it is the obligation of the courts to refrain from such exertions of judicial power." *Id.* at 84. To that end, both courts and the NLRB consistently invalidate under section 8 contractual provisions that interfere with employees' section 7 rights and provisions like joint-action bans contained in arbitration agreements should be no exception. See, *e.g.*, *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978); *Extendicare Homes, Inc.*, 348 N.L.R.B. 1062, 1078 (2006). The joint-action ban's illegality alone is thus enough to decide this case—without any reference to the FAA.

II. Nothing In The FAA Revives Epic's Illegal Joint-Action Ban

The fact that the joint-action ban is illegal under federal law completely resolves this case. There is "no doubt" that agreements made illegal by federal statute "will not be enforced." *Kaiser Steel*, 455 U.S. at 77 (permitting an illegality defense to a collective bargaining agreement on the grounds that it violated the NLRA and the Sherman Act).

Notwithstanding the plain illegality of Epic's ban, petitioner alleges that the FAA somehow resurrects it and demands enforcement. This is not so. In fact, even if the FAA applies, it offers at least three independent grounds for invalidating the joint-action ban. The first springs from the language of the FAA itself, which states that arbitration contracts "shall be valid,

irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. 2 (emphasis added). This "saving clause" invalidates agreements made unenforceable by federal statute. The second is the "rule against prospective waivers," an FAA doctrine designed to ensure that particular terms in arbitration agreements do not obstruct parties' core federal statutory rights, even when the underlying claims are otherwise arbitrable. See *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310-2311 (2013); *id.* at 2314 (Kagan, J., dissenting). And the third is the "contrary-congressional-command" doctrine much noted by the employers.

Each of these lines of argument is sufficient to nullify contract terms subject to the FAA. Accordingly, the employers must overcome all three to sustain their position. But, properly construed, none of these approaches support them: the NLRA and NLGA render joint-action bans illegal, such agreements prospectively waive the core rights these statutes protect, and both statutes represent a contrary congressional command sufficient to override the FAA's mandate.

A. The FAA's Saving Clause Prohibits Enforcement Of Arbitration Provisions That Violate Federal Statutes Such As The NLRA And NLGA

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. 2 (emphasis added). Epic's joint-action ban is an illegal contract

provision that falls squarely within the FAA's saving clause and is thus unenforceable.

It is a fundamental principle of contract law that illegal promises cannot be enforced. See, *e.g.*, Restatement (Second) of Contracts § 178 (Am Law Inst. 1981) ("A promise or other term of an agreement is unenforceable * * * if legislation provides that it is unenforceable."). This Court has unequivocally held that its "cases leave no doubt that illegal promises will not be enforced in cases controlled by * * * federal law." *Kaiser Steel*, 455 U.S. at 77. Thus, if a contract formed under state law violates a federal law, as joint-action bans do, pp. 26-33, *supra*, no court should enforce it.

Wisconsin contract law, which governs the dispute in question, is clear, moreover, that "[t]he general rule of law is, that all contracts which are * * * contrary to the provisions of any statute, are void." *Melchoir* v. *McCarty*, 31 Wis. 252, 254 (1872). Under generally applicable state law, then, the ban is a legal nullity and an agreement without legal effect cannot force employees into individual arbitrations.

The saving clause, of course, does not recognize grounds of contract illegality that target arbitration. In particular, this Court has held that the saving clause allows arbitration agreements to be invalidated by "generally applicable contract defenses" but not by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). Here, the contract defense of illegality does not apply only to arbitration nor does it

derive its meaning from the fact that an agreement to arbitrate is at issue. As the Ninth Circuit explained in analyzing the arbitration agreement in *Morris*, "[t]he problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right [under the NLRA] to pursue concerted work-related legal claims." Pet. App. at 14a, *Ernst & Young LLC* v. *Morris*, (No. 16-300). The problem with the joint-action ban, in short, is not that it requires arbitration as a forum, but rather that it forbids joint action in *any* forum in violation of the NLRA and NLGA. The Epic agreement also bars any non-individual—*i.e.*, injunctive—relief, Pet. App. 2a, and thus strips employees of additional statutory rights. Asserting illegality under the NLRA and NLGA, moreover, hardly disfavors arbitration. A contract forbidding joint action in court (without mentioning arbitration) would be equally invalid. Because the defense of illegality is a "generally applicable contract defense" that does not attack the arbitration clause itself, it falls squarely within the FAA's saving clause.

Epic makes four arguments as to why the saving clause should not apply to defenses of illegality.[7] First,

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[7] Ernst & Young makes a separate argument as novel as it is wrong. It suggests that state-law contract defenses of illegality cannot recognize contract illegality under federal law. See E&Y Br. 35. That reasoning disregards both the Supremacy Clause and this Court's reasoning in *Testa* v. *Katt*, 330 U.S. 386 (1947). There, this Court held, "[w]hen Congress * * * adopt[s an] act, it sp[ea]k[s] for all the people and all the states, and thereby establishe[s] a policy for all. That policy is as much the policy of [a state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state." *Id.* at

it claims, "saving clauses in federal statutes save *inferior* laws, like state law or federal common law; they do not save 'other federal statutes enacted by the same sovereign.'" Epic Br. 20 (quoting *Alt. Entm't*, 858 F.3d at 418 (Sutton, J., concurring in part and dissenting in part). That is simply—there is no polite way to put it—wrong. Just two weeks before Epic filed its opening brief, for example, this Court held that the federal venue statute's "saving clause," 28 U.S.C. 1391(a), saved the venue provisions of another federal statute, 28 U.S.C. 1400(b). *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). Other examples where this Court has found federal saving clauses saving other federal statutory provisions include *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 386-387 (1982) (noting that "saving clause [of] exclusive-jurisdiction provision [of federal securities law]" saved general statutory "jurisdiction conferred on courts of the United States"), and *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 144-146 (1967) (holding that saving clause of Food, Drug, and Cosmetic Act saved judicial review provisions available under the APA).

Second, Epic claims that, by its terms, the FAA's saving clause "applies only to grounds for the revocation of '*any* contract'" and "in turn excludes defenses * * * that may be invoked only with respect to a specific subset of contracts." Epic Br. 20-21 (quoting 9 U.S.C. 2). The single authority it extensively discusses, however, *Southland*, 465 U.S. 1, concerns a defense that specifically *targeted* arbitration, *id.* at 10.

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392 (quoting *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912)).

The saving clause has never recognized such targeted defenses. Epic's general argument, moreover, surprises on its face. Under its reasoning, the saving clause would not recognize the defense of incapacity, for example, because it "may be invoked only with respect to a specific subset of contracts," namely those involving an underaged party or one otherwise incapable of forming consent.

Third, Epic contends, "the saving clause does not preserve any ground that would interfere[] with fundamental attributes of arbitration." Epic Br. 24. At such a lofty level of generality, however, that cannot be right. If taken seriously, it would undercut *all* contract defenses, whenever they would invalidate a "fundamental attribute of arbitration." Consider someone raising the defense of fraud-in-the-inducement to an arbitration provision. Under Epic's reasoning, that defense could not succeed since it would invalidate the arbitration itself—surely one of its own "fundamental attributes." Such a view, however, would turn the saving clause into a nullity.

Epic also makes a narrower form of this argument resting on *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Epic Br. 24-27. But that case is not to the contrary. In *Concepcion*, consumers asserted that an arbitration provision was unenforceable under a judicially-created California state law that barred class-action waivers in most arbitration agreements on the grounds that they were unconscionable. *Id.* at 337-340. This Court declined to read the FAA's saving clause as facilitating a state policy which "st[oo]d as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 343.

Concepcion is inapposite for several reasons. First, the holding in *Concepcion* turned on the fact that a *state* law disfavored arbitration. The Court explicitly recognized that there were certain procedures "not * * * envisioned by the FAA" that "*States* may not superimpose on arbitration." *Concepcion*, 563 U.S. at 351 (emphasis added). The Court went on to explain that some procedures "may not be required by *state* law" and that "*States* cannot require a procedure that is inconsistent with the FAA." *Ibid.* (emphasis added). At no point did this Court suggest that the FAA requires enforcement of a contractual provision that directly violates *federal* statutes such as the NLRA and NLGA.

Second, the focus of the Court's concern in *Concepcion* was California's law of unconscionability, a state contract doctrine which the Court noted could be applied in a way that was "toothless and malleable" and "ha[d] no limiting effect." *Concepcion*, 563 U.S. at 347. The doctrine gave judges who disfavored arbitration great discretion to restrict the practice at will. Its standards were flexible, moreover, and were not susceptible to effective appellate supervision. These characteristics made the doctrine less than neutral and generally applicable and meant that in a particular case the doctrine "derive[d its] meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339. The Court specifically "not[ed, moreover,] that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* at 342. Indeed, numerous scholars have attacked unconscionability for its ad hoc application and many have seen California as the paradigm of its abuse. See, *e.g.*, Arthur Allen Leff,

Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 488 (1967) (noting the "amorphous intelligibility" of California's unconscionability statute); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency* 46 Hastings L.J. 459, 465 (1995) ("California courts have been both less restrained and more inconsistent than courts in other jurisdictions in applying the unconscionability doctrine."). Illegality, on the other hand, which includes violations of the public policies expressly set forth in the NLRA and NLGA, is not a pliable contract defense, is not subjective, and is subject to effective appellate supervision. Statutes are limited in scope, and the justification for holding a contract unenforceable when it violates a federal statute is much greater than when it offends a malleable and amorphous state-law doctrine.

This Court's decision in *CompuCredit*, 565 U.S. 95, a choice-of-forum case, also does not help petitioner. In that case, the Court characterized the issue as "whether claims under the [Credit Repair Organization Act (CROA)] can proceed in an arbitrable forum." *Id.* at 104. Here, the issue is not whether any particular forum, including arbitration, is appropriate, but rather whether a provision that illegally bans joint action in *any* forum can be enforced under the FAA. *CompuCredit* concerned, moreover, a completely different objection to arbitration: whether the CROA represents a "contrary congressional command," *id.* at 98-101, foreclosing arbitration (discussed pp. 47-52, *infra*). It nowhere discussed whether an illegal provision of a contract could be enforced under the FAA's saving clause.

Fourth, Epic argues that since the text of the saving clause "applies only to grounds 'for the *revocation* of any contract'" it recognizes only those defenses specified in a *different* FAA provision going to "'the making of the agreement for arbitration.'"[8] Epic Br. 27 (quoting 9 U.S.C. 2, 4). Even if Epic's statutory argument were correct, however—and it is not—the saving clause would still recognize the defense of illegality. If, as Epic contends, the "word 'irrevocable[']' means that the contract to arbitrate * * * can be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract or provision of a contract," *id.* at 28 (quoting *Zimmerman* v. *Cohen*, 139 N.E. 764, 766 (N.Y. 1923)), illegality is exactly such a defense. A court, if asked, would revoke a provision of a contract illegal "at or before the time of its making." That is, in fact, exactly the situation here. Contracts barring joint legal action have been illegal since the NLRA and NLGA were enacted, see pp. 9-33, *supra*, long before Epic forced its employees to waive that right.

The history of the FAA is more helpful, moreover, than Epic allows. It makes clear that the saving clause was never understood to require enforcement of illegal agreements. The language of the FAA originated in the New York Arbitration Act (NYAA), 120 N.Y. Laws, ch. 275. Indeed, Congress itself acknowledged that the FAA is based on the NYAA. See *Arbitration of Interstate Commercial Disputes: Joint Hearings before*

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[8] Epic also ignores that the saving clause in the *Lewis* contract itself does not rest on revocability but on unenforceability. See Pet. App. 35a. Thus, even if Epic's fourth argument were correct as to the FAA itself, it would not control in this case.

the Subcomms. of the H. & S. on the Judiciary on S. 1005 & H.R. 646, 68th Cong., 1st Sess. 19 (1924) (statement of Sen. Sterling) (*Arbitration: Joint Hearings*). And this Court has considered New York courts' understanding of the NYAA instructive when interpreting the FAA. See, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 286-287 (1995) (interpreting the FAA in light of New York precedents). Indeed, this Court has noted that "the FAA was copied" from the NYAA. *Id.* at 287.

The NYAA and the FAA were passed to remedy a particular problem: the so-called "revocability doctrine," which denied specific performance as a remedy for breach of an arbitration agreement. See *Arbitration: Joint Hearings* 16 (describing how FAA overturns revocability doctrine). In the first major lawsuit challenging the new law, then-Judge Cardozo, writing for the New York Court of Appeals, held that the NYAA permitted specific performance but that "[o]f course, we exclude cases where the contract is inherently immoral *or in contravention of a statute*."[9] *Berkovitz*, 130 N.E. at 290 (emphasis added). This view of the NYAA's scope was widely shared around the time of the FAA's enactment in 1925. See, *e.g.*, *Am. Eagle Fire Ins. Co.* v. *N.J. Ins. Co.*, 148 N.E. 562, 566 (N.Y. 1925) (Crane, J., dissenting) ("The contract of arbitration is to be construed like any other contract and all its terms and conditions given force and effect *unless they are against public policy or illegal*."

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[9] Then-Judge Cardozo's exception also puts paid to Epic's argument that saving clauses can save only inferior laws, see p. 37, *supra*. What New York inferior statutes could then-Judge Cardoza have been referring to? Municipal ordinances?

(emphasis added)); *Zimmerman* v. *Cohen*, 139 N.E. 764, 765 (N.Y. 1923) ("The [NYAA] was passed to provide a means for enforcing an agreement to arbitrate; it did not otherwise change the law of contracts which is as applicable to such an agreement as to other terms and conditions."). *Berkovitz* was also frequently mentioned in congressional hearings during the enactment of the FAA, alerting Congress to New York's interpretation. See *Arbitration: Joint Hearings* 17, 33, 34, 39.

B. By Preventing Employees From Exercising Core Rights Under The NLRA And NLGA, Epic's Joint-Action Ban Violates The Rule Against Prospective Waivers

The FAA's prospective-waiver doctrine also forbids enforcement of Epic's joint-action ban. As a general matter, courts will not enforce even agreed-upon waivers of federal statutory rights necessary to achieving Congress's purposes. See *Brooklyn Sav. Bank*, 324 U.S. at 707 ("No one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."). For example, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, this Court drew a distinction between parties' inability to alter by agreement "applicable liability principles," *i.e.*, "substantive obligations and particular procedures" protected by the statute at issue, which were "designed to correct specific abuses," and parties' freedom to decide "the forum in which the[se principles] are to be vindicated." 515 U.S. 528, 534-536, 540-541 (1995); see also *CompuCredit*, 565 U.S. at 102 ("The parties remain free to [arbitrate], so long as * * * *the guarantee of the legal power to impose*

liability—is preserved."). This Court has long acknowledged this basic maxim in its FAA jurisprudence by recognizing that "arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies'" will not be enforced. *Italian Colors*, 133 S. Ct. at 2310 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

Under this "prospective-waiver doctrine," courts evaluate whether specific provisions of an arbitration agreement obstruct parties' core federal statutory rights. See *Italian Colors*, 133 S. Ct. at 2310-2311; *Randolph*, 531 U.S. at 90. If a provision does so, it is unenforceable, even if it is not formally illegal or the relevant statute does not reflect a congressional command forbidding arbitration. See *Italian Colors*, 133 S. Ct. at 2310; *Randolph*, 531 U.S. at 90.

The doctrine most conclusively applies where a party can demonstrate that an arbitration agreement prohibits the exercise of federal statutory rights, *Italian Colors*, 133 S. Ct. at 2310 ("[The doctrine] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."), as joint-action bans do. It is beyond doubt that the right to joint action is an "essential feature[]," *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481-482 (1989), of the NLRA and NLGA and that it was fundamental to Congress's objectives in enacting these statutes. The statutes' text affirmatively grants and protects the right of workers to act jointly to promote their employment interests. See pp. 10-16, 19-25 *supra*.

The history and purposes of the NLRA and NLGA do the same. The Acts' history plainly reflects the importance of the right to joint action. See pp. 19-22, *supra*. Their public policy declarations equally do so. See pp. 17, 19-20, *supra*; 29 U.S.C. 102, 151. And adjudicative interpretations of the Acts' purposes further highlight the right's "essential" nature. For example, this Court has described section 7 of the NLRA, including its "mutual protection" clause, as "a fundamental right" *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). The NLRB has likewise held that joint action "is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *Horton I*, 357 N.L.R.B. at 2286.

This Court's discussion of *Vimar*, 515 U.S. at 530-536, and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), in *Italian Colors*, 133 S. Ct. at 2311-2312, reinforces this analysis. There, this Court observed that, in *Vimar*, "[t]he Court rejected the argument that the 'inconvenience and costs of [arbitrating]' abroad 'lessen[ed]' the defendants' liability" under the Carriage of Goods by Sea Act, and it indicated that "[s]uch a 'tally[ing] [of] the costs and burdens'" is impermissible in the FAA context. *Ibid.* (citations omitted). Here, however, Epic's joint-action ban directly proscribes exercising rights protected by the NLRA and NLGA. See pp. 9-33 *supra*. It does not simply make doing so costly or inconvenient. Likewise, this Court explained that, "[i]n *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the * * * Age Discrimination in Employment Act[] expressly permitted collective actions." *Italian Colors*, 133 S. Ct.

at 2311. This decision, however, was premised on the fact that, under the ADEA, joint action is not a core, unwaivable right akin to freedom from discrimination. See *Gilmer*, 500 U.S. at 27-28, 32. *Gilmer*, in fact, did not involve any NLRA or NLGA claims. Under the NLRA and NLGA, by contrast, joint action *is* a core right. See pp. 9-16, 19-22, *supra*. Accordingly, enforcing Epic's contract would not be comparable to sustaining the class waiver in *Gilmer*, but rather to upholding a prospective waiver of liability for age discrimination or of any other "essential" federal right. Cf. *14 Penn Plaza*, 556 U.S. at 265 ("[F]ederal antidiscrimination rights may not be prospectively waived.").

C. The NLRA And NLGA Represent A Contrary Congressional Command Sufficient To Override The FAA

This Court need not inquire whether the NLRA "overrides" the FAA because, as demonstrated above, the statutes can be read in harmony by applying the FAA's saving clause or the prospective-waiver doctrine. If the Court does reach this inquiry, however, and finds that the FAA and NLRA conflict, the NLRA and NGLA announce a strong "contrary congressional command" against the enforcement of joint-legal action bans in individual employment-related arbitration agreements. In addition, if the Court were to find an irreconcilable conflict between the FAA, on the one hand, and the NLRA and NLGA, on the other, the later-enacted NLRA and NLGA would repeal the FAA to that extent.

This Court has explained that "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a

contrary congressional command." *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). Such a command can be deduced from the conflicting statute's "text or legislative history," or "from an inherent conflict between arbitration and the statute's underlying purpose," *id.* at 227, and can apply to specific provisions of an arbitration agreement, see *Italian Colors*, 133 S. Ct. at 2309 (analyzing class-action waiver). The question is simple: did Congress "evince[] an intention to preclude" the disputed directive. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). Such a command requires no specially emphatic force, specificity, or magic words.

Both the text and underlying purpose of the NLRA and NLGA evince precisely this type of narrow contrary congressional command against the enforcement of joint-action bans in individual employment-related arbitration agreements. First, the text of the NLRA unambiguously protects employees' right to engage in joint action. See pp. 10-16 *supra*. Section 7 explicitly declares that employees have a right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Similarly, section 3 of the NLGA bars enforcement of any "agreement" that violates the Act's public policy guaranteeing employees' right to act concertedly for mutual aid and protection. *Ibid.* Section 3 further declares that such agreements "shall not afford any basis for the granting of legal or equitable relief by any [court of the United States]." 29 U.S.C. 103. And, as this Court has explained, an order compelling arbitration pursuant to an agreement between parties is a form of specific performance, a remedy in equity. See *Southland Corp.*

v. *Keating*, 465 U.S. 1, 13 (1984) ("The [FAA] sought to 'overcome the rule of equity, that equity will not *specifically enforce* any arbitration agreement.'") (citation omitted) (emphasis added); *Red Cross Line* v. *Atl. Fruit Co.*, 264 U.S. 109, 118-122 (1924) (describing orders compelling arbitration as a type of specific performance).

Although these statutes lack specific language referencing arbitration, this is hardly surprising given that when the Acts were passed courts had never applied the FAA to individual employment contracts. In fact, it was not until 2001 that this Court definitively ruled that the FAA applied to them. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001). By prohibiting employer interference with employees' right to engage in joint legal action, the plain text of the NLRA and NLGA establishes a contrary congressional command precluding the enforcement of employer-mandated joint-action bans in individual arbitration agreements.

Pursuant to this Court's explanation in *McMahon*, federal courts have consistently found a contrary congressional command when the FAA's enforcement mandate inherently conflicts with the underlying purpose of another federal statute. See, *e.g.*, *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1067-1069 (5th Cir. 1997) (finding that arbitration of some core bankruptcy proceedings conflicts with the underlying purposes of the Bankruptcy Code). In the bankruptcy context, for example, federal courts have concluded that arbitration of some bankruptcy proceedings would conflict with the Bankruptcy Code's underlying purposes of "centraliz[ing] [the] resolution of purely

bankruptcy issues [and] protect[ing] creditors and reorganizing debtors from piecemeal litigation." *Id.* at 1069; see also *In re White Mountain Mining Co., LLC*, 403 F.3d 164, 169-170 (4th Cir. 2005) (similarly concluding that arbitration of certain core bankruptcy proceedings would conflict with the Bankruptcy Code's purposes of "[c]entralization of disputes concerning a debtor's legal obligations" and "protect[ion of] reorganizing debtors and their creditors from piecemeal litigation").

Although the Court failed to find a contrary congressional command in *CompuCredit*, 565 U.S. 95, in the Credit Repair Organization Act (CROA), the history and purpose of that Act differ markedly from those of the NLRA and NLGA. As the Court noted, the CROA was designed only to create "the guarantee of the legal power to impose liability," not to specify the forum that must impose such liability. *CompuCredit*, 565 U.S. at 102 (emphasis not included). As demonstrated above, the text, purpose, and history of the NLRA and NLGA make clear that the statutes were designed to allow employees to join together in legal actions "for the purpose of * * * mutual aid or protection."

Furthermore, the later-enacted NLRA (1935) and NLGA (1932) repealed conflicting provisions of the FAA (1925) and therefore supersede its mandates. Section 15 of the NLGA *expressly* repeals provisions of the FAA that conflict with the NLGA. 29 U.S.C. 115 ("All acts and parts of acts in conflict with the provisions of this chapter are repealed."). And, although the NLRA contains no similar express repeal, this Court has instructed that in the rare cases

where statutes "irreconcilabl[y] conflict," the later-enacted Act impliedly repeals the earlier. *Posadas* v. *Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). In both acts, then, Congress repealed any conflicting provisions within the FAA. See *Lockhart* v. *United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs."); *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955) ("Unless we are to require the Congress to employ magical passwords in order to effectuate an exemption * * * we must hold that the present statute expressly supersedes the [earlier-enacted, conflicting] provisions."). And, while the FAA was recodified in 1947, this Court has held that a non-substantive re-enactment of a statute does not affect last-in-time analysis. See *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961) (re-enacted "identical" provision "can[not] fairly be regarded as a later enactment"); *Anderson* v. *Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912) ("[I]t will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."). When Congress recodified the FAA, it had no intention of substantively changing the Act. See S. Rep. No. 80-664, 80th Cong., 1st Sess. 1 (1947) (recodification made no "material change[s]" and "[n]o attempt * * * to make amendments in existing law"); H.R. Rep. No. 80-251, 80th Cong., 1st Sess. 1 (1947) (same); H.R. Rep. No. 80-255, 80th Cong., 1st Sess. 1 (1947) (same). Congress substantively amended the NRLA, on the other hand, in 1947, 1959, and 1974, further supporting an implied repeal of any irreconcilably conflicting provisions in the FAA. See

Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947); Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 136 (1959); Labor Relations Act, amendments, Pub. L. 93-360, 88 Stat. 395 (1974).

* * *

Employers and their amici mistakenly and repeatedly rely on two faulty assumptions about arbitration. First, they assert that there is a federal policy favoring arbitration agreements. While there is no doubt that the FAA was originally enacted in response to "hostility to arbitration agreements," this federal policy applies only to put arbitration contracts "on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. After that, the policy has little applicability, especially to provisions, like the joint-action bans here, that would have exactly the same scope and effect if they appeared in a contract that did not mention arbitration. Thus, the FAA cannot resuscitate a contract that clearly violates federal law. That would put the contract not "on equal footing" but on steroids—far beyond what Congress intended.

Second, the employers argue that there is a presumption in favor of arbitrability. Any such presumption applies, however, "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand" and controls only "where the presumption is not rebutted." *Granite Rock* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010). Since the joint-action ban is illegal, however, it cannot "cover[]" any dispute and,

even if it somehow did, its illegality would conclusively rebut any presumption that it should apply.

D. The Employers' View Of The FAA, Not The Employees', Would Lead To Absurd Results

Epic makes several eye-popping claims about where requiring the availability of joint proceedings would lead. All are unfounded. First, Epic argues, "mandatory arbitration in the employment context would be a thing of the past." Epic Br. 47. Not true. So long as employees can pursue joint legal action through a law suit *or* arbitration their section 7 rights are preserved and joint arbitration has long been a feature of labor law. Second, Epic fancifully contends that "employers would be forever prohibited from opposing a request for class certification, no matter the forum [and that] courts would be unable to deny them." *Id.* at 48. Again, untrue. Section 7 does not mean that otherwise inappropriate joint action can proceed, just that an employer cannot take away all types of otherwise available joint action.[10]

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[10] The employers and their amici's various arguments sounding in the Rules Enabling Act, 28 U.S.C. 2072(b), *e.g.*, Epic Br. 48-49, are especially puzzling. Epic, for example, argues that a court could never enforce Rule's 23's certification requirements without "abridg[ing]" or "modify[ing]" the employees' section 7 right. *Id.* at 49. But section 7 requires only that a generally available joint procedural device be made available to employees on the same terms as it is made available to everyone else. It does not require that it be made available on preferential or unconditional terms.

Amici push the Rules Enabling Act even further. They argue in various ways that if section 7 grants a right to pursue joint legal action, then Rule 23 "modif[ies]" that right and is therefore an invalid rule of federal procedure. See, *e.g.*, Amicus Br. Retail

Rather it is Epic's position that leads to absurd results. It would require courts to uphold arbitration provisions that are *themselves* illegal because "[a] defense that exists only because of the presence of a particular arbitration provision in a contract is not generally applicable." Pet. 19. Thus, under Epic's view, its joint-action ban would be impervious to legal challenge even if, for instance, it were adopted by collusive arrangement with other employers for the purpose of restraining trade. Such an interpretation, however, is foreclosed by this Court's decision in *Paramount Famous Lasky Corp.* v. *United States*, in which an arbitration agreement was held unlawful under the Sherman Act because it "provide[d] for compulsory joint action [against violators]" and major film industry participants "refus[ed] to contract for display of pictures" using any other arrangement. 282 U.S. 30, 40-41 (1930); see also *Ross* v. *Am. Express Co.*, 35 F. Supp. 3d 407, 456 (S.D.N.Y. 2014) ("[T]he collusive adoption of mandatory class-action-barring arbitration clauses, if proven, would have constituted an unreasonable restraint on trade."). Likewise, the employers' view would require courts to enforce arbitration agreements inserted into contracts solely on the basis of race or sex. But see 42 U.S.C. 1981(b); *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 (1984) ("A

Litigation Center 20-22; Amicus Br. Council on Labor Law Equality 24-26. They fail to see, however, that their argument would eat through all the federal rules. As the employers admit, for example, section 7 clearly protects the right to pursue individual legal action to vindicate rights secured by a collective bargaining agreement. See, *e.g.*, Epic Br. 37. Under the employers' amici's view, however, most of the federal rules would "modify" that right since they determine how it can be exercised in a judicial proceeding and would thus be invalid.

benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion."). But, as this Court has held, "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by [an] Act," a court cannot require such conduct. *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959).

The sole exception Epic would allow is when Congress has not only made certain conduct illegal but also specifically and expressly referenced arbitration or the manner in which it is carried out. But that would require Congress to add otherwise unnecessary language expressly addressing arbitration in *every* statute that makes conduct illegal.[11] Surely, the FAA does not require Congress to act so redundantly. If Congress has declared something illegal, the courts cannot require it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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[11] This view of illegality does not, as the employers contend, "gut," E&Y Br. 35, "circumvent," *id.* at 36, or "swallow," *e.g.*, Amicus Br. Washington Legal Foundation 19, this Court's contrary-congressional-command analysis. That analysis applies primarily to *legal* arbitration provisions and practices, not *illegal* ones. That explains why prior cases in this Court addressing the conflict between the FAA and other federal statutes turned on contrary congressional commands rather than the FAA's saving clause, see, *e.g.*, Epic Br. 20. These cases alleged conflict but no illegality.

Respectfully submitted.

DAVID C. ZOELLER
WILLIAM E. PARSONS
CAITLIN M. MADDEN
KATELYNN M. WILLIAMS
HAWKS QUINDEL, S.C.
222 West Washington Ave., Suite 450
Madison, WI 53701
(608) 257-0040
dzoeller@hq-law.com

DANIEL R. ORTIZ
Counsel of Record
TOBY J. HEYTENS
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127
dro@virginia.edu

ADAM HANSEN
APOLLO LAW LLC
400 South 4th Street, Suite 401M - 250
Minneapolis, MN 55415
(612) 927-2969

AUGUST 2017

Appendix of Relevant Statutory Provisions

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C.A. § 2, provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 101, provides:

Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 2 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 102, provides:

Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 3 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 103, provides:

Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

Section 4 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 104 provides in pertinent part:

Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

* * *

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

* * *

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified.

Section 15 of the Norris-LaGuardia Act (NLGA), 29 U.S.C.A. § 115 provides:

Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Section 1 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or

interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the National Labor Relations Act (NLRA), 29 U.S.C.A. § 158 provides in pertinent part:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

RECORD AND BRIEFS

Nos. 16-285 & 16-307

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth and Seventh Circuits

REPLY BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

PAUL D. CLEMENT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

[additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional counsel:

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Counsel for Epic Systems Corporation

JEFFREY A. SCHWARTZ
JACKSON LEWIS P.C.
1155 Peachtree Street, NE
Suite 1000
Atlanta, GA 30309

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

Counsel for Murphy Oil USA, Inc.

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioner Epic Systems Corporation and respondent Murphy Oil USA, Inc., remains accurate.

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REPLY BRIEF FOR PETITIONER EPIC SYSTEMS CORPORATION AND RESPONDENT MURPHY OIL USA, INC.

INTRODUCTION

The view of the National Labor Relations Act (NLRA) advanced by the other side (hereinafter Respondents) is truly remarkable. In their view: Section 7 gives employees a right to participate in joint legal proceedings that is substantive for pur-

poses of overriding the Federal Arbitration Act (FAA), but procedural for purposes of avoiding a Rules Enabling Act problem and applicable only to proceedings that are "available" (a term not found in Section 7). Board Br. 19. Section 8, which by its terms prohibits any employer effort to interfere with or restrain a Section 7 right, nonetheless allows an employer to actively resist class certification in particular circumstances, Hobson Br. 22, and even to eliminate altogether the right in court, Board Br. 38. Finally, Respondents submit that this sometimes-substantive, sometimes-procedural, sometimes-backed-by-Section-8, sometimes-not right is sometimes nonwaivable (when it comes to the employees and agreements here, *id.* at 8) and sometimes waivable (if the waivers are limited to judicial proceedings, *id.* at 9-10; restricted to past disputes, Hobson Br. 57; or negotiated by a union, Board Br. 29-30).

No other right works this way, and it is hard to escape the conclusion that Respondents' interpretation of the NLRA has been gerrymandered to defeat the FAA and bilateral arbitration. Their shape-shifting conception of the NLRA is certainly not the *only possible* reading of the statute. Yet to prevail, Respondents must show that it is. That is because, as this Court has twice made clear, the FAA protects the right to agree to bilateral arbitration and thus unambiguously *mandates* enforcement of the class waivers here. So unless the NLRA contains a contrary congressional command—that is, a clearly expressed congressional intention to *preclude* the waivers—the Court should reconcile the two statutes by construing the NLRA in harmony with the FAA. Because Respondents' extraordinary view of the

statute is not clearly expressed in the NLRA, the class waivers should be enforced.

ARGUMENT

I. THE FAA AND THE NLRA SHOULD BE INTERPRETED HARMONIOUSLY TO MANDATE ENFORCING THE CLASS WAIVERS

In cases involving the interaction of two federal statutes, the Court's "duty" is to harmonize them, if at all possible. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *see also Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("[R]epeals by implication are not favored."). When one of the statutes speaks unambiguously, the possibility of harmonization will depend on whether the other contains a "clearly expressed congressional intention to the contrary." *Morton*, 417 U.S. at 551. If the other statute contains such a "contrary congressional command," *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012), the two statutes are irreconcilable, and the question becomes which statute should be given "priority," *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 533 (1995). But if the other statute contains no contrary congressional command, the two statutes are "capable of co-existence," and the Court should adopt a permissible construction of the second statute that reconciles it with the unambiguous mandate of the first. *Morton*, 417 U.S. at 551.

In light of the lingering hostility to arbitration, this Court has had numerous opportunities to apply these principles to the FAA and allegedly conflicting statutes, and to reconcile the conflict by applying the

clear command of the FAA. There is no reason for a different result here.

A. Absent A Contrary Congressional Command, The NLRA Should Be Construed To Avoid Conflicting With The FAA's Unambiguous Mandate

This Court's decisions involving the FAA and other allegedly conflicting federal statutes make clear how this framework should apply. Opening Br. 14-18. The FAA speaks unambiguously, declaring arbitration provisions "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Accordingly, the FAA "requires courts to enforce agreements to arbitrate according to their terms, * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 565 U.S. at 98 (internal quotation marks omitted). And the Court has repeatedly held that a critical part of an agreement to arbitrate that courts must enforce is the agreement to arbitrate bilaterally. *See Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309-2312 (2013); *AT & T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011).

Here, the Court must again consider whether a federal statute—the NLRA—may be reconciled with the unambiguous mandate of the FAA. Respondents nevertheless insist that this Court can sidestep its well-established path for reconciling competing statutes for three reasons. Each lacks merit.

1. The FAA's saving clause cannot serve as an alternative to the congressional-command test

Respondents first contend that the two statutes should be harmonized through the FAA's saving clause, not the congressional-command test. *E.g.*, Board Br. 37. But in case after case involving potential conflicts between the FAA and other federal statutes, this Court has *never* relied on the saving clause. Opening Br. 20. If the saving clause really were the appropriate means of reconciling the FAA with competing federal statutes, it would surely have featured prominently in the Court's prior decisions, and the Court would not have consistently demanded that the parties challenging arbitration provisions shoulder the "burden" of showing that the FAA's "mandate" had been "overridden by a contrary congressional command." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 226-227 (1987); *see also CompuCredit*, 565 U.S. at 109 (Sotomayor, J., concurring in the judgment) (explaining that the "burden" made a difference in *CompuCredit*).

Respondents maintain that an arbitration provision that violates a federal statute is illegal, and that illegality is a ground preserved by the saving clause. *E.g.*, Board Br. 37, 45. Of course, the same could be said for every competing federal statute this Court has addressed via the congressional-command test. Indeed, *every* ground for challenging a contract could be said, at the most general level, to be a ground of "illegality." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444 (2006). But the saving clause does not preserve *every* such ground. The Court so held in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). That case involved an arbitration

provision that violated a state statute. *Id.* at 10. The dissent argued that the statute rendered the provision "void as a matter of public policy," *id.* at 20 (Stevens, J., concurring in part and dissenting in part)—which is to say, the provision's *illegality* under the state statute rendered it contrary to public policy. The Court nevertheless held that the statute fell beyond the limits of the saving clause because the statute was "not a ground that exists at law or in equity 'for the revocation of *any* contract.'" *Id.* at 16 n.11 (majority opinion).

Southland thus reinforces that Respondents' effort to invoke the saving clause is unavailing. Indeed, the NLRA lies beyond the limits of the saving clause for four independent reasons.

First, the FAA's saving clause saves only *inferior* laws, like state law or federal common law. *See NLRB* v. *Alt. Entm't, Inc.*, 858 F.3d 393, 418 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part). Respondents contend that there is no precedent supporting this view. Hobson Br. 40. But the relevant precedent is this Court's unbroken line of prior decisions involving the FAA and competing federal statutes, not one of which relies on the saving clause. Opening Br. 20.

Respondents invoke a New York Court of Appeals decision construing the New York arbitration statute on which the FAA was based. *E.g.*, Lewis Br. 43. In that decision, the court suggested that arbitration contracts "in *contravention* of a statute" would not be enforced. *Berkovitz* v. *Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921) (emphasis added). The court, however, never said that that was because of the statute's saving clause. And the words "in *con-*

travention of a statute" seem to capture well the "*contrary* congressional command" test. *McMahon*, 482 U.S. at 226 (emphasis added). *Berkovitz* is thus fully consistent with applying that test here.

Second, the saving clause applies only to grounds "'for the revocation of *any* contract,'" as *Southland* holds. 465 U.S. at 16 n.11. Respondents maintain that this requirement is satisfied so long as a ground does not "specifically *target*[] arbitration." Lewis Br. 38. The relevant passage in *Southland*, however, draws a different distinction: between grounds that apply to "*any* contract" and grounds that apply only to a particular *subset* of contracts—such as "contracts subject to the California Franchise Investment Law" (as was the case in *Southland*) or contracts subject to the NLRA (as is the case here). 465 U.S. at 16 n.11. Lower courts have read *Southland* in exactly this way. *See* Opening Br. 23 (citing cases).

According to Respondents, this reasoning would mean that the saving clause would fail to preserve the defense of incapacity. *E.g.*, Lewis Br. 39. That is mistaken. The incapacity defense does apply to *any* contract: If *any* contract on any subject is entered into by a party incapable of forming consent, that contract is revocable. By contrast, the NLRA, as construed by Respondents, would apply only to contracts *between employers and employees*: Only if an *employment* contract violates Sections 7 and 8 would that contract be illegal. The "any contract" requirement also explains why this Court has *never* relied on the saving clause in a case involving the FAA and another federal statute: In each of those prior cases, as here, the other federal statute applied only to a particular subset of contracts. Opening Br. 22.

Third, the saving clause does not preserve any ground that discriminates against arbitration by disfavoring contracts that have the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344; *see also Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017). Respondents maintain that the NLRA is neutral with respect to arbitration, because "[a] contract forbidding joint action in court (without mentioning arbitration) would be equally invalid." Lewis Br. 37. But that was also true of the *Discover Bank* rule in *Concepcion*, 563 U.S. at 341, and the Court held that it did not make a difference: The rule still "interfere[d] with fundamental attributes of arbitration" by disfavoring agreements for bilateral arbitration that foreclosed the possibility of class arbitration. *Id.* at 344.

Respondents attempt to distinguish *Concepcion* on the ground that it involved a "*state* law [that] disfavored arbitration." Lewis Br. 40. That distinction fails. To begin, that attempted distinction of *Concepcion* is fundamentally inconsistent with Respondents' major premise that the saving clause either applies equally to state or federal law or actually incorporates the federal-law standard for illegality into state law. *Id.* at 36, 38; Hobson Br. 35 n.13, 40-41. If either proposition is true, then *Concepcion* cannot be dismissed as a case involving state law. Moreover, *Concepcion* construed the saving clause as inapplicable to laws that interfered with a fundamental attribute of arbitration. 563 U.S. at 343-344. That test turns not on the source of the law, but on its effect. Put differently, fundamental interference is fundamental interference, and nothing in *Concepcion* suggests a greater tolerance for fundamental inter-

ference from a federal law. Indeed, if even the presumption against preemption of state law is not enough to save the *Discover Bank* rule, *see Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992), there is no reason an NLRA-based rule should be treated more favorably.

Fourth, the saving clause applies only to grounds "for the *revocation* of any contract," 9 U.S.C. § 2 (emphasis added), which, as Justice Thomas has explained, means that the ground must challenge the "*formation* of the arbitration agreement," *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring) (emphasis added). Lewis contends that the facts rendering the class waivers "illegal" existed "at or before the time of [the agreements'] making." Lewis Br. 42 (internal quotation marks omitted). But tellingly, Lewis stops short of saying that those facts pertained to "whether the [agreements were] *properly made*." *Concepcion*, 563 U.S. at 357 (Thomas, J., concurring) (emphasis added). Because they do not, the saving clause does not apply. For each of these reasons, the saving clause cannot serve as an alternative to the congressional-command test.

2. Whether the class waivers violate the NLRA cannot be determined independently of the congressional-command test

The Board also contends that "none" of the Court's prior "congressional-command cases involved an [arbitration] agreement that was illegal because it violated a federal statute." Board Br. 47. But that misunderstands the precedent. In *every* case, the plaintiffs *claimed* their arbitration agreements were illegal, invalid, and unenforceable because they violated a federal statute. This Court did not resolve

those claims by looking at the other federal statute in isolation, but instead rejected those claims after analyzing whether the competing statute in question contained a contrary congressional command and concluding that it did not. Opening Br. 14-18. Respondents' illegality distinction is thus no distinction at all. This Court's congressional-command analysis is precisely suited for claims that another federal statute, here the NLRA, renders the arbitration agreement illegal.

3. There is no substantive-rights exception to the congressional-command test

Respondents also contend that the congressional-command test "does not apply in cases involving prospective waivers of *substantive*, statutory rights." Hobson Br. 49 (emphasis added). Again, that misunderstands the precedent (and the NLRA for that matter). In *every* case involving the FAA and a competing federal statute, the Court asks whether there is a contrary congressional command in the other statute. In answering that question, the substance/procedure dichotomy is not determinative. While this Court has sometimes alluded to the distinction, it has done so only to emphasize that a statute does not contain a congressional command against arbitration merely because the statute's substantive rights may be vindicated through particular judicial procedures.

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), is illustrative. In that case, the plaintiff alleged that an arbitration agreement abridged his substantive rights by foreclosing particular procedural avenues for vindicating those rights. *Id.* at 27-28, 30-32. The Court held that Congress's articula-

tion of a judicial means of pursuing substantive rights in the Age Discrimination in Employment Act (ADEA) should not be viewed as a congressional command barring arbitration. *Id.* at 29. Therefore, *Gilmer* represents an application of the congressional-command test even in the face of an allegation that arbitration would abridge plaintiffs' substantive rights.*

Italian Colors makes the point even more clearly. That case involved the same type of arbitration provision as here: a "waiver of class arbitration." 133 S. Ct. at 2309. The plaintiffs alleged that the waivers impeded their *substantive* rights under the antitrust laws by barring the class procedures necessary to vindicate those statutory rights. *Id.* The Court nonetheless asked whether "the FAA's mandate ha[d] been overridden by a contrary congressional command"—the precise question it should ask here. *Id.* (internal quotation marks omitted).

Respondents nevertheless insist that there must be a substantive-rights exception to prevent arbitration provisions that discriminate on the basis of race, sex, or age. *E.g.*, Lewis Br. 54. Such provisions, though, would plainly violate the clear congressional commands embodied in Title VII and the ADEA, which prohibit such discrimination in no uncertain terms.

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* It is telling, moreover, that even though *Gilmer* considered the employment context and the ADEA referenced collective proceedings (a point the Court discussed at length), no one thought the NLRA or Section 7 even relevant to the discussion. Not even the AFL-CIO, which filed an amicus brief to raise a different issue outside the question presented (namely, the question later resolved in favor of arbitration in *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001)), thought Section 7 of the NLRA merited a mention.

29 U.S.C. § 623(a); 42 U.S.C. § 2000e-2(a). Those statutes' unambiguous commands would "overrid[e]" the FAA's mandate, rendering the discriminatory provisions unenforceable. *CompuCredit*, 565 U.S. at 98 (internal quotation marks omitted). There is no need to create an exception to the congressional-command test to preclude a parade of horribles that the test already forecloses. The difference here is that while Title VII and the ADEA contain unambiguous provisions barring discrimination based on race, sex, and age, the NLRA contains no unambiguous provision barring class waivers.

In any event, not only is Respondents' insistence on an exception to the congressional-command test mistaken, but it also does not help them. At the very most, the arbitration agreements here foreclose one procedural mechanism of pursuing the statutory right to "concerted activities," and *Gilmer* and *Italian Colors* make clear that is not enough to render the arbitration agreements invalid. *See Italian Colors*, 133 S. Ct. at 2309-2312; *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) (the right to class proceedings is "a procedural right only"); Opening Br. 40-41, 47.

In sum, the FAA unambiguously mandates enforcement of the class waivers, and the relevant question—as in the many similar cases this Court has decided—is whether the other statute contains a contrary congressional command, foreclosing the possibility of harmonization.

B. The NLRA Lacks A Contrary Congressional Command

The NLRA lacks a "clearly expressed congressional intention" to preclude enforcement of the class

waivers here. *Morton*, 417 U.S. at 551. Respondents assert that such a contrary congressional command can be found in Sections 7 and 8(a)(1). They suggest that Section 7 creates a semi-unwaivable, semi-substantive right to engage in every form of "concerted activity," including joint legal proceedings. And they claim that Section 8(a)(1) bars an employer from some, but not all, efforts to restrict employees from exercising those Section 7 rights. *E.g.*, Board Br. 12-20.

It is doubtful that the statute can reasonably bear such a broad and unusual understanding of the rights it confers, but the Court need not definitively decide *that* question. Respondents' understanding certainly is not "clearly expressed," *Morton*, 417 U.S. at 551, and that alone is enough to require that the class waivers be enforced.

1. Section 7 does not clearly create a right to participate in joint legal proceedings

Respondents assert that Section 7 gives employees a right to "collective litigation of legal claims." Board Br. 7. But Respondents cannot point to any "clearly expressed congressional intention" to confer such a right. *Morton*, 417 U.S. at 551. The NLRA makes no mention of joint legal proceedings, and was enacted years before Federal Rule of Civil Procedure 23 and the Fair Labor Standards Act, at a time when "individual" litigation (and bilateral arbitration) was the "usual rule." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted). Confronting a nearly identical situation in *Italian Colors*, this Court held that the federal antitrust statutes contained "[n]o contrary congressional command re-

quir[ing] [the Court] to reject [a] waiver of class arbitration." *Id.*

a. Respondents have little to say about that holding in *Italian Colors*. They instead begin their analysis by relying on *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978), for the proposition that "concerted activities" must include joint legal proceedings. In *Eastex*, this Court acknowledged the existence of Board and lower-court precedent in which employees engaged in "mutual aid or protection" under Section 7 through "resort to administrative and judicial forums." *Id.* at 565-566. A line from a judicial opinion, however, cannot substitute for the "clearly expressed congressional intention" necessary to override the FAA's mandate. *Morton*, 417 U.S. at 551. And this line would make a particularly poor substitute, given that it makes no explicit reference to arbitration and is accompanied by a footnote expressly declining to decide "what may constitute 'concerted' activities in this context." *Eastex*, 437 U.S. at 566 n.15. Thus, as the Board, Lewis, and Hobson must ultimately acknowledge, the meaning of "concerted activities" was not even at issue in *Eastex*. Board Br. 14 & n.2; Lewis Br. 10 & n.1; Hobson Br. 18.

In any event, even if *Eastex* could be read to suggest that "resort to" a judicial forum could involve "concerted activities," there are any number of ways in which employees may act in concert in the course of litigation—from hiring a lawyer to pooling finances to deciding to initiate individual litigation simultaneously—that do not involve class proceedings. Opening Br. 37, 40.

b. The text and structure of the NLRA confirm that even if employees have some right to engage in

"concerted activities" in the judicial forum, it does not include the right to be treated as a class. The NLRA places no obligation on judges or arbitrators to process employees' claims jointly. That silence is telling because it sets the right Respondents claim apart from the enumerated rights within Section 7. Most of those rights are something that an employee can "just *do*," without the blessing of a third party, *Alt. Entm't*, 858 F.3d at 415 (Sutton, J., concurring in part and dissenting in part)—like "self-organiz[ing]" or "choosing" "representatives" for collective bargaining, 29 U.S.C. § 157. And, when the enumerated rights do require the participation of employers or a third party, the NLRA's other provisions set out the corresponding obligations for those parties. For example, Section 7 creates a right to collective bargaining, but Section 8(a)(5) mandates that employers come to the table. Opening Br. 35. And, as Lewis points out, Section 9 sets out what the Board must do in order to vindicate employees' Section 7 right to choose an exclusive bargaining representative. Lewis Br. 14-15.

Thus, under the canon of *ejusdem generis*, "other concerted activities" should be understood to encompass only those rights that employees can engage in unilaterally or with the participation of other parties that is mandated elsewhere in the Act. Opening Br. 33-34. Because the right to participate in class proceedings does not fit that description, it is not clearly included within Section 7.

c. Respondents attempt to evade this difficulty by asserting that the Section 7 right places no *new* obligations on judges or arbitrators because it entitles employees to participate in a class action only if a class action is otherwise permitted under Rule 23.

But that means that the breadth of an employee's substantive Section 7 rights expanded significantly upon the promulgation of Rule 23 and depends on the application of that Rule, a proposition that runs directly contrary to the Rules Enabling Act. The Act mandates that the Federal Rules shall not "abridge, enlarge or modify" substantive rights. 28 U.S.C. § 2072(b).

Respondents wave off that concern, noting that Rule 23's limitations on the right to engage in class proceedings are no different from the limitations placed on the right to strike by the number of accessible sidewalks. Hobson Br. 21 n.7. But there is no "Sidewalk Enabling Act" prohibiting the scope of substantive rights from turning on the availability of sidewalks. The Rules Enabling Act establishes just such a prohibition with respect to the Federal Rules.

To accommodate *that* awkwardness, respondents seek to redefine Section 7 to include the right to engage in concerted activities only *"if and as available."* Board Br. 19. But those words appear nowhere in the text of the NLRA, and Respondents' application of this added qualifier is haphazard. On the one hand, they claim that class proceedings are *available* to them despite the waivers they signed, despite the fact that the FAA mandates that arbitration agreements be honored, and despite the fact that Section 7 does not protect "concerted activities such as those that are * * * in breach of contract." *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 17 (1962). On the other hand, Respondents assert that Rule 23 permissibly renders some class proceedings *un*available, despite the Rules Enabling Act.

The distinction is hard to defend. It is far more natural to conclude that even if Section 7 protects employees working together in the judicial forum, it does not permit them to override a contractual waiver *or* the limits of Rule 23 in order to demand class or collective treatment from the judge or arbitrator.

d. Perhaps recognizing the impossibility of locating a contrary congressional command in the NLRA, Respondents invoke a predecessor statute, the Norris-LaGuardia Act (NLGA). But that Act actually undermines their novel reading of Section 7. Section 4 of the NLGA contains a list of concerted activities that the Act protects from being enjoined. 29 U.S.C. § 104. All of those activities are things that employees just *do*, including the one that Respondents focus on most: "aiding" someone "who is being proceeded against in, or is prosecuting, any action or suit in any court." *Id.* § 104(d). As the origins of that provision make clear, Congress had in mind activities like "sending money" to a litigant. Opening Br. 38-39.

Respondents find it "puzzling" that Congress would protect the right to send money but not the right to have their claims processed jointly. Lewis Br. 22 n.3. But again, the latter right is different from everything mentioned in the NLGA: It cannot be exercised without imposing new obligations on others. It would also interfere deeply in the judicial (and arbitral) process in a way that none of the self-executing rights in the NLGA does. Respondents' reliance on the NLGA—including as an independent ground for invalidating the class waivers—is therefore misplaced.

e. Finally, Respondents' attempt to find support in the NLRA's purposes also fails. *E.g.*, Board Br. 15-16. Those purposes do not support the anti-arbitration rule Respondents seek. As Respondents point out, one of the NLRA's key purposes was to ameliorate the "inequality of bargaining power between employees * * * and employers." 29 U.S.C. § 151. But the outcome in a courtroom (and in arbitration) is driven by the law and the neutral decisionmaker, not by the numbers on a particular side. Whether employees sue individually or as a class should not affect their "separate entitlements." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion). Class proceedings thus are hardly necessary to further the purpose of bargaining equality.

2. Section 8 does not prohibit employers from channeling concerted activities into particular procedural mechanisms

Section 8 poses, if anything, an even greater challenge for Respondents. That provision broadly prohibits any employer effort to "interfere with or restrain" activities protected under Section 7. 29 U.S.C. § 158(a)(1). Thus, if Section 7 really created a substantive right to collective litigation, then it would seem that every employer's effort to resist certification or decertify a class once certified would constitute a Section 8 violation. But not even Respondents can embrace that absurd position, and so they are forced to defend a distinction between a prospective class waiver in an arbitration agreement (which they deem an unfair labor practice) and efforts to resist class certification (which they deem permissible, *e.g.*, Lewis Br. 53; Hobson Br. 22). And that is on top of the awkwardness of explaining

why—as this Court has held—Section 8 poses no obstacle to a standard arbitration agreement that necessarily waives *every* form of "concerted activity" within the judicial forum, *see* Opening Br. 41; Board Br. 9-10, 38; Lewis Br. 53; Hobson Br. 55, but—according to Respondents—blocks these class waivers. Respondents' position has no grounding in the unqualified text of Section 8.

Thus, having twisted the "concerted activities" of Section 7 to protect a right unlike any other, Respondents must twist Section 8 to permit some efforts to interfere with allegedly protected activities. The alternative of interpreting Section 7 to protect concerted activities that do not depend on the approval of a judge or arbitrator has much to recommend it. But at an absolute minimum, Respondents' distort-Section-7-then-distort-Section-8 construction is neither the only construction of the NLRA nor anything like the contrary congressional command required by this Court's cases.

3. At a minimum, employees should be permitted to waive their supposed right to participate in joint legal proceedings

Respondents do not merely argue that *employers* are barred from limiting access to class proceedings; they claim that *employees* are barred from waiving this supposed right through an individual contract. But as noted above, this Court has specifically stated that "[Section] 7 does not protect *** concerted activities such as those that are *** in breach of contract." *Wash. Aluminum*, 370 U.S. at 17. And Respondents concede that a contract may validly waive an employee's right to engage in all concerted activities within the judicial forum, if the employee

retains his right to arbitrate. Board Br. 9-10. Neither of these propositions could be true if employees are wholly precluded from entering contractual agreements to waive Section 7 rights. And indeed, they are not.

a. The proposition that individual class waivers are barred runs into its initial obstacle in the statutory text. Section 7 gives employees both the right to "engage" in concerted activities and to "refrain" from engaging in those activities. 29 U.S.C. § 157. Assuming class litigation is included within the former right, barring employees from waiving the right to class proceedings runs contrary to the latter right. Respondents' only answer is that the right to refrain must be exercised on a case-by-case basis "at the appropriate time," and may not be formalized as a contractual promise. Board Br. 28-29. But that strips employees who wish to refrain from certain concerted activities of any benefit they might obtain from their willingness to collectively refrain. Only if an employee is able to contract away that right up front when other benefits are up for discussion may she use it as a bargaining chip to obtain other benefits she values. Nothing in Section 7 or the NLRA as a whole provides an excuse for depriving employees of that benefit.

Moreover, Respondents readily acknowledge that a union representative may waive an employee's supposed right to joint legal proceedings through a collective-bargaining agreement. Respondents' argument is only that an employee may not waive the right on her own behalf in an individual contract. Aside from the basic inequity of holding that an employee may not waive for herself what her union may waive for her, this position runs contrary to

clear precedent holding that—in the absence of a union—employees are free to enter into individual contracts that cover the same material as collective-bargaining agreements. *See J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944) ("Care has been taken * * * to reserve a field for * * * a *completely individually bargained contract* setting out terms of employment * * * ." (emphasis added)). And this Court has recently been even more explicit with respect to arbitration agreements, stating that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009).

b. Nonetheless, Respondents contend that *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case* preclude any individual waivers of Section 7 rights. But those cases stand for much narrower propositions. *National Licorice* holds only that an employer may not use unlawful labor practices to pressure its employees into signing individual contracts that release their right to engage in collective bargaining. *Id.* at 360. *J.I. Case* holds that independent contracts entered into before employees have unionized may not be used to preclude collective bargaining if and when a union is formed. 321 U.S. at 337. Those holdings are part of the lengthy tradition—codified in the NLGA—barring "yellow dog" contracts, individual agreements in which employees surrender their rights to unionize or bargain collectively. *See* 29 U.S.C. § 103.

That rule makes sense: An employee who enters an individual contract and later comes to believe that

her employment has been conditioned on unfair terms may join forces with her colleagues in a union that can use its collective-bargaining power to negotiate more equitable terms. That solution would be out of reach if an employer could use individual contracts to impede collective bargaining. But the same concerns do not apply with respect to individual contracts that waive joint legal action. If the employee comes to believe that the individual waiver was inequitable, she may unionize and bargain for a new contract that does not include such a waiver. Simply put, being party to an arbitration agreement that precludes class arbitration does not meaningfully prevent an employee from unionizing. While honoring such an agreement lies at the core of the FAA, permitting such an agreement poses no material risk to the concerns at heart of the NLRA. Indeed, Respondents' effort to paint a standard agreement for bilateral arbitration as a modern-day yellow-dog contract evinces the very hostility to arbitration the FAA is designed to counteract.

4. The Board is not entitled to deference

Unable to ground many of their arguments in the text of the statute or the precedent of this Court, Respondents repeatedly rely on the holdings of the Board. *E.g.*, Board Br. 15, 23. But the Board itself does not even claim *Chevron* deference in this case. *See Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

For good reason. Notions of deference are misplaced when this Court needs to resolve the competing demands of two statutes, only one of which is interpreted by the Board. Opening Br. 50-53. It is thus doubtful that a regulatory interpretation could

ever supply the kind of contrary *congressional* command this Court's cases demand. But a long-standing, well-reasoned position might at least have a chance. Here, the Board's position is neither. It reflects a recent about-face and involves a novel effort to divine a prohibition on class waivers in statutory provisions that do not so much as mention arbitration.

Moreover, *Chevron* deference is rooted largely in the need to defer to the politically accountable Executive Branch. *See* 467 U.S. at 865-866. But in this case, the Board is an independent agency, and the politically accountable Executive Branch has come out *against* the Board's interpretation. U.S. Br. 13. In such circumstances, *Chevron* deference is inappropriate.

* * *

There is another way. Section 7's right to engage in "concerted activities" includes activities that an employee may engage in on her own, or with the support of employers and third parties as explicitly mandated in the Act. The right to participate in collective or class legal proceedings does not fit that bill. And even if it did, nothing in the NLRA precludes employers from channeling concerted activities into a particular procedural form, or individual employees from waiving class proceedings through an arbitration agreement. In short, the NLRA contains no congressional command contrary to class waivers, and it can—and should—be reasonably construed in harmony with the FAA's mandate that such waivers be enforced.

II. IF THE FAA AND THE NLRA CANNOT BE HARMONIZED, THE FAA SHOULD BE GIVEN PRIORITY

If the NLRA did contain a contrary congressional command, the Court would still have to confront the question of which statute should be given priority. Respondents contend that the NLRA should take precedence because it was enacted later in time. *E.g.*, Lewis Br. 51-52. But "a specific statute will not be controlled or nullified by a general one, *regardless of the priority of enactment*." *Morton*, 417 U.S. at 550-551 (emphasis added). And because the FAA is the more specific of the two statutes, it should govern here. Opening Br. 54-56. Moreover, giving priority to the FAA would impair the NLRA only peripherally, while giving priority to the NLRA would undermine the FAA at its core. *Id.* at 56-57. Thus, even if the two statutes cannot be reconciled, the class waivers should be enforced.

CONCLUSION

The judgment of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgment of the Seventh Circuit in *Epic* should be reversed.

Respectfully submitted,

PAUL D. CLEMENT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

JEFFREY A. SCHWARTZ
JACKSON LEWIS P.C.
1155 Peachtree Street, NE
Suite 1000
Atlanta, GA 30309

DANIEL D. SCHUDROFF
JACKSON LEWIS P.C.
666 Third Avenue
New York, NY 10017

Counsel for Murphy Oil USA, Inc.

NEAL KUMAR KATYAL
Counsel of Record
FREDERICK LIU
COLLEEN E. ROH SINZDAK
DANIEL J.T. SCHUKER
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022

Counsel for Epic Systems Corporation and Murphy Oil USA, Inc.

NOAH A. FINKEL
ANDREW SCROGGINS
SEYFARTH SHAW LLP
233 South Wacker Drive
Suite 8000
Chicago, IL 60606

Counsel for Epic Systems Corporation

SEPTEMBER 2017

RECORD AND BRIEFS.

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-285, 16-300, and 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTH, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND SUPPORTING RESPONDENTS IN NO. 16-307

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and whether such agreements are enforceable under the Federal Arbitration Act, 9 U.S.C. 2.

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In the Supreme Court of the United States

No. 16-285

EPIC SYSTEMS CORPORATION, PETITIONER

v.

JACOB LEWIS

No. 16-300

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

No. 16-307

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND SUPPORTING RESPONDENTS IN NO. 16-307

INTEREST OF THE UNITED STATES

These cases present the question whether arbitration agreements that bar individual employees from pursuing work-related claims on a collective or class basis impermissibly limit the employees' right under the National Labor Relations Act (NLRA) to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, or whether such agreements instead are enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. 2. The United States and the National Labor Relations Board (NLRB or Board) have responsibility for enforcing the NLRA, and the NLRB filed a petition for a writ of certiorari in No. 16-307.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-13a.

STATEMENT

1. In 1925, Congress enacted the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, to "overcome judicial resistance to arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). The FAA provides that any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. If a suit is brought concerning "any issue referable to arbitration under an agreement in writing for such arbitration,

the court in which such suit is pending" must, "on application of one of the parties," stay the proceedings and refer the matter to arbitration in accordance with the parties' agreement. 9 U.S.C. 3.

2. The National Labor Relations Act, 29 U.S.C. 151 *et seq.*, was enacted in 1935 to encourage collective bargaining and to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. 151. The NLRA provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has committed "an unfair labor practice." 29 U.S.C. 158(a)(1). The National Labor Relations Board "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

In January 2012, the Board ruled that agreements between individual employees and their employers that require arbitration of work-related disputes on a bilateral (rather than collective or classwide) basis interfere with the employees' right under Section 157 to engage in concerted activities, in violation of Section 158(a)(1). *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-2283. The Board determined that, "[j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section [157], the prohibition of individual agreements

imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section [158]." *Id.* at 2281.

The Board also expressed the view that its ruling did not conflict with the FAA. The Board stated that its rationale was not specific to arbitration, and that the contractual term at issue "would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the [employer] solely on an individual basis." *D.R. Horton*, 357 N.L.R.B. at 2285. The Board also noted that, under the FAA's saving clause, see 9 U.S.C. 2 (requiring enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract"), arbitration agreements "remain subject to the same defenses against enforcement to which other contracts are subject." 357 N.L.R.B. at 2284.

On review, the Fifth Circuit rejected the Board's analysis. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 360-362 (2013). The court held that enforcement of the challenged arbitration agreement would not "deny a party any statutory right" because "use of class action procedures * * * is not a substantive right" under Section 157. *Id.* at 357.[1] Judge Graves dissented in relevant part, explaining that he agreed with the Board's reasoning. *Id.* at 364-365.

3. These consolidated cases involve agreements, signed by individual employees and their employers, in

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[1] The Fifth Circuit in *D.R. Horton* agreed with the Board that an arbitration agreement constitutes an unfair labor practice to the extent that it prohibits employees from filing unfair-labor-practice charges with the Board. 737 F.3d at 364.

which the parties have agreed to resolve work-related disputes through bilateral arbitration.

a. Epic Systems Corporation makes healthcare software. 16-285 (*Epic*) Pet. App. 1a. In April 2014, it sent an email to its employees requiring them, as a condition of employment, to agree to arbitrate all wage-and-hour claims. The agreement specified that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding." *Id.* at 2a (emphasis omitted).

Jacob Lewis, an employee who had consented to the arbitration agreement, filed a federal-court suit against Epic Systems "individually and on behalf of all others similarly situated." *Epic* Pet. App. 2a, 24a. Lewis alleged that Epic Systems had violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, and state law by denying overtime pay to him and other employees. When Epic Systems moved to dismiss the suit and to compel bilateral arbitration, Lewis argued that the arbitration agreement was invalid and unenforceable under the NLRA. *Epic* Pet. App. 2a-3a. The district court agreed with Lewis and denied Epic Systems' motion. *Id.* at 24a-29a.

The Seventh Circuit affirmed. *Epic* Pet. App. 1a-23a. The court concluded that the "text, history, and purpose" of Section 157 show that it "should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 5a-6a. The court also stated that, even if Section 157 were ambiguous, the court would defer to the Board's determination that the NLRA "prohibit[s] employers from making agreements with individual employees barring access to class or collective remedies." *Id.* at 7a (citing *D.R. Horton*). The court rejected Epic Systems' contention that the FAA

required enforcement of the agreement. *Id.* at 12a-23a. The court concluded that, because Epic Systems' concerted-action waiver is prohibited by the NLRA, and because illegality is a "ground[] * * * for the revocation of any contract" within the meaning of the FAA's saving clause, 9 U.S.C. 2, the waiver is unenforceable under the FAA's own terms. *Epic* Pet. App. 12a-15a.

b. Ernst & Young LLP and its U.S.-based affiliate (collectively, Ernst & Young) provide accounting services. 16-300 (*E&Y*) Pet. App. 2a, 43a-44a. Ernst & Young required its employees, as a condition of employment, to sign a "concerted action waiver" in which they agreed to arbitrate any legal claims against the company and to do so "only as individuals and in separate proceedings." *Id.* at 2a (internal quotation marks omitted). Despite signing that agreement, two Ernst & Young employees filed suit in federal court, on behalf of themselves and others similarly situated, alleging that the company had improperly denied them overtime wages in violation of the FLSA and state law. *Ibid.* The district court granted Ernst & Young's motion to compel bilateral arbitration and dismissed the suit. *Id.* at 43a-67a.

The Ninth Circuit reversed. *E&Y* Pet. App. 1a-25a. The court held that the NLRA gives employees a "right to pursue work-related legal claims together," and that Ernst & Young had violated that right by requiring its employees to resolve their legal claims in separate arbitration proceedings. *Id.* at 3a; see *id.* at 3a-11a. The court held that the FAA "does not dictate a contrary result" because that statute requires only that arbitration contracts be placed "'on equal footing with all other contracts,'" and the collective-action waiver would contravene the NLRA even if it were not contained in an

arbitration agreement. *Id.* at 12a (quoting *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 468 (2015)) (citation omitted); see *id.* at 12a-14a. The court also characterized the employees' right to seek redress collectively as a non-waivable "substantive federal right," thereby distinguishing it from other cases involving "procedural" rights that may be limited by agreement. *Id.* at 15a-16a; see *id.* at 14a-21a.

Judge Ikuta dissented. *E&Y* Pet. App. 25a-42a. She explained that, "[i]n determining whether the FAA's mandate requiring 'courts to enforce agreements to arbitrate according to their terms' has been overridden by a different federal statute, the Supreme Court requires a showing that such a federal statute includes an express 'contrary congressional command.'" *Id.* at 28a (quoting *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012)). Because the NLRA does not expressly prohibit the type of arbitration agreement that is at issue here, Judge Ikuta would have enforced the agreement as written. *Id.* at 34a-38a.

c. Murphy Oil USA, Inc. operates more than 1000 gas stations in 21 States. 16-307 (*Murphy Oil*) Pet. App. 24a. Murphy Oil required each of its employees and job applicants to sign a "Binding Arbitration Agreement and Waiver of Jury Trial" in which the parties waived their "right to commence, be a party to, or act as a class member in, any class or collective action" in any judicial or arbitration proceeding "relating to employment issues." *Id.* at 24a-25a (brackets omitted). In June 2010, four employees sued Murphy Oil in federal court, alleging FLSA violations. Invoking the arbitration agreement, Murphy Oil successfully moved to dismiss the collective action and to compel arbitration. *Id.* at 26a-28a.

One of the employees then filed an unfair-labor-practice charge with the Board, and the Board's General Counsel issued an administrative complaint against Murphy Oil. *Murphy Oil* Pet. App. 27a. In October 2014, the Board sustained the charge, reaffirming its prior decision in *D.R. Horton* and finding that Murphy Oil had violated the employee's right under the NLRA "to engage in collective action." *Id.* at 40a (quoting *D.R. Horton*, 357 N.L.R.B at 2286); see *id.* at 17a-89a. The Board stated that the NLRA creates "a substantive right to engage in concerted activity," and that the challenged arbitration agreement therefore "amounts to a prospective waiver of a right guaranteed by the NLRA." *Id.* at 43a. The Board also determined that its ruling did not conflict with the FAA because "the mandatory arbitration agreement is invalid under Section 2 of the FAA, the statute's savings clause," and because 29 U.S.C. 157 "amounts to a 'contrary congressional command' overriding the FAA." *Murphy Oil* Pet. App. 44a-46a (footnote omitted) (quoting *CompuCredit*, 565 U.S. at 98). Two members of the Board dissented in relevant part. See *id.* at 89a-131a (Member Miscimarra); *id.* at 131a-208a (Member Johnson).

Murphy Oil filed a petition for review, which the Fifth Circuit granted in relevant part. *Murphy Oil* Pet. App. 1a-16a. The court adhered to its precedent in *D.R. Horton*, holding that an employer may lawfully require its employees to agree to pursue all employment-related claims through bilateral arbitration, rather than through class or collective actions. *Id.* at 2a, 7a-8a & n.3.

SUMMARY OF ARGUMENT

Under the FAA, agreements to resolve disputes through arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Courts must enforce agreements to arbitrate federal claims unless the FAA's mandate has been overridden by a contrary congressional command or unless enforcing the parties' agreement would deprive the plaintiff of a substantive federal right. Neither of those justifications for non-enforcement is applicable here. The parties' agreements, including their prohibition on class-wide or collective proceedings, should therefore be enforced according to their terms.

A. The FAA's strong presumption in favor of enforcing arbitration agreements may yield where "Congress itself" has overridden that presumption in another statute. *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted). In mandating enforcement of agreements to arbitrate a variety of federal statutory claims, the Court has made clear that statutory authorization to pursue class actions in court for violations of particular federal laws is insufficient to override the FAA's directive that agreements to arbitrate must be enforced.

Although the FLSA authorizes employees to pursue collective actions in court, that authorization is not meaningfully different from similar provisions of other laws that this Court has found insufficient to override the FAA's mandate to enforce arbitration agreements as written. Presumably for that reason, plaintiffs in these cases have not argued, and the courts of appeals that ruled in their favor did not suggest, that the FLSA—the statute under which plaintiffs' federal

claims arise—overrides the FAA's directive that their arbitration agreements should be enforced. Plaintiffs' argument thus depends on the proposition that the NLRA's recognition of a general right to engage in "concerted activities," 29 U.S.C. 157, confers greater rights to pursue FLSA claims collectively than does the FLSA itself.

In no other context, however, has Section 157 been construed to expand the availability of class or collective remedies beyond those that are authorized by the laws that directly address those issues. Section 157 would not, for example, allow employees who do not satisfy the numerosity and typicality requirements of Federal Rule of Civil Procedure 23 to pursue a class action against their employer. Similarly here, Section 157 does not supersede the balance struck in the FAA and FLSA, or expand the range of circumstances in which collective litigation can go forward.

Nothing in the NLRA's legislative history indicates that Congress intended to bar enforcement of arbitration agreements like those at issue here. The legislative record accompanying bills that became the NLRA mentioned arbitration only briefly, in stating that Congress had declined to impose mandatory arbitration or to make the Board an arbitration agency. And while the NLRB's reading of ambiguous NLRA language is entitled to judicial deference, the Board's analysis of the interplay between the NLRA and the FAA is not.

B. In mandating enforcement of pre-dispute agreements to arbitrate various federal statutory claims, this Court has often emphasized that an agreement to arbitrate does not entail any surrender of substantive statutory rights. Similarly here, the parties' arbitration

agreements do not purport to authorize employer conduct that would violate the FLSA's wage-and-hour provisions, and they do not prevent a successful plaintiff from recovering (through arbitration) the full relief that a court could award for an FLSA violation.

Nor does enforcement of the arbitration agreements deprive plaintiffs of any substantive right under the NLRA. Although Section 157 unquestionably confers important substantive rights to organize and to engage in collective bargaining, the arbitration agreements do not constrain plaintiffs' exercise of those rights. Even assuming that the right to utilize collective dispute-resolution mechanisms for FLSA claims is encompassed within Section 157's residual phrase ("other concerted activities"), there is no evident reason for viewing it as a substantive NLRA right, when it is clearly a procedural right under the FLSA itself.

This Court's decisions in *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), do not support a different conclusion. In those cases, the Court invalidated agreements between employers and their employees to resolve work-related disputes on a bilateral basis. But it did so because the employers had used the agreements as a basis for refusing to engage in collective bargaining. The agreements at issue here do not have any analogous anti-union purpose.

C. The FAA's saving clause provides no sound basis for declining to enforce the parties' arbitration agreements. The FAA's strong policy in favor of enforcing arbitration agreements applies equally to the parties' right to "specify *with whom* they choose to arbitrate their disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010). The Seventh and

Ninth Circuits understood the NLRA to prohibit enforcement of agreements to arbitrate work-related disputes bilaterally. The courts found that to be the sort of arbitration-neutral rule that the saving clause preserves because the rule focuses on the requirement of *bilateral* arbitration, rather than on the agreement to arbitrate as such.

This Court's decisions make clear, however, that the saving clause does not preserve rules of contract enforceability that would impede the achievement of the FAA's objectives, even when those rules are capable of application to contracts other than arbitration agreements. The Court in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), applied that principle to hold that a state-law rule against enforcement of class-action waivers contained in certain consumer contracts fell outside the saving clause. For substantially the same reasons, the saving clause does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the FAA.

ARGUMENT

WHEN PARTIES AGREE TO ARBITRATE EMPLOYMENT-RELATED CLAIMS BILATERALLY, THE FAA REQUIRES ENFORCEMENT OF THOSE AGREEMENTS

The FAA establishes a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the "central" feature of which is a directive that "private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted). When contracting parties have agreed to resolve federal claims through bilateral arbitration, that choice must be honored "unless the

FAA's mandate has been overridden by a contrary congressional command." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (*Italian Colors*) (citations and internal quotation marks omitted).

Under that approach, the agreements at issue here must be enforced. Although plaintiffs in these cases assert causes of action under the FLSA (as well as under state law), they do not contend that the FLSA itself precludes enforcement of their agreements to arbitrate those statutory claims. And neither the text nor the history of the NLRA suggests that it gives plaintiffs greater rights to pursue collective litigation than they can assert under other sources of law like the FLSA. Enforcement of plaintiffs' arbitration agreements would not deprive them of their substantive right under the FLSA to proper wage-and-hour compensation, or any procedural right under the NLRA to invoke whatever class or collective procedures are otherwise available to them.

In *Murphy Oil*, this Office previously filed a petition for a writ of certiorari on behalf of the NLRB, defending the Board's view that agreements of the sort at issue here are unenforceable. After the change in administration, the Office reconsidered the issue and has reached the opposite conclusion. Although the Board's interpretation of ambiguous NLRA language is ordinarily entitled to judicial deference, courts do not defer to the Board's conclusion as to the interplay between the NLRA and other federal statutes. We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the FAA.

More specifically, the Board's view that the phrase "other concerted activities" in 29 U.S.C. 157 encompasses participation in collective or class litigation may reflect a permissible interpretation of that language, such that an employer might commit an unfair labor practice by discharging employees who initiated or joined such suits in accordance with other provisions of law. It does not follow, however, that Section 157 *expands* the range of circumstances in which such litigation can go forward, by allowing employees who validly waived their collective-litigation rights under the FLSA to escape the consequences of that choice. The Board's approach fails to respect the FAA's directive that arbitration agreements should be enforced unless they run afoul of arbitration-neutral rules of contract validity.

A. The NLRA Does Not Preclude Enforcement Of An Agreement To Arbitrate Employees' Work-Related Claims Bilaterally

The FAA "reflects the overarching principle that arbitration is a matter of contract." *Italian Colors*, 133 S. Ct. at 2309. When parties agree in writing to resolve disputes through arbitration, the agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The FAA requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (brackets, citations, and internal quotation marks omitted). To be sure, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command." *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220,

226 (1987). But a party resisting enforcement of an arbitration agreement bears the "burden" of showing "that Congress intended to preclude" enforcement. *Id.* at 227.

1. Bilateral arbitration agreements should be enforced absent a specific congressional command to the contrary

a. Although the policy in favor of arbitration applies to both federal- and state-law claims, see, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), this Court was initially reluctant to enforce agreements to arbitrate disputes that involved federal statutory rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court considered whether to enforce the parties' agreement to arbitrate a claim under the Securities Act of 1933. The Court observed that the Securities Act contained provisions "conferring jurisdiction" on federal district courts, *id.* at 433 & n.16 (citing 15 U.S.C. 77v(a) (1952)), and declaring "'void'" any agreement "'to waive compliance with any provision' of the Securities Act," *id.* at 430 (quoting 15 U.S.C. 77n). Based on those provisions, and on its skepticism of arbitration and arbitrators, see *id.* at 435-436, the Court determined that "the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness," *id.* at 437. The Court thus held that "the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [Securities] Act." *Id.* at 438.

The *Wilko* Court's skepticism of arbitration, and its approach to reconciling the FAA with other federal statutes, were short-lived. In *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court held that the FAA

required enforcement of an agreement to arbitrate a dispute under the Securities Exchange Act of 1934, despite a statutory provision giving federal district courts "exclusive jurisdiction" over such suits. *Id.* at 514 (quoting 15 U.S.C. 78aa (1970)); see *id.* at 513-521. In *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court explicitly acknowledged that the balance it had previously struck in reconciling the FAA with other federal statutes had been colored by an inappropriate hostility toward arbitration. *Id.* at 626-628. And in *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), the Court overruled *Wilko*, a step the Court described as necessary "to correct a seriously erroneous interpretation of statutory language that would undermine congressional policy." *Id.* at 484.

b. In more recent decisions addressing the enforceability of agreements to arbitrate federal statutory claims, the Court has asked whether "Congress itself," in enacting the statute that created the plaintiff's cause of action, "evinced an intention to preclude" enforcement of the parties' agreement. *Gilmer*, 500 U.S. at 26 (citation omitted). "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Ibid.* (quoting *McMahon*, 482 U.S. at 227). The Court has further explained that "the burden" rests with the party resisting enforcement of the arbitration agreement "to show that Congress intended" that result. *Ibid.* In each of those cases, after examining relevant text, history, and purpose, the Court concluded that Congress did not speak with the necessary specificity. See, *e.g.*, *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89-92

(2000) (Truth in Lending Act); *Gilmer*, 500 U.S. at 26-33 (Age Discrimination in Employment Act of 1967); *Rodriguez de Quijas*, 490 U.S. at 479-484 (Securities Act of 1933); *McMahon*, 482 U.S. at 227-242 (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors*, 473 U.S. at 628-629 (Sherman Act).

CompuCredit Corp. v. *Greenwood*, 565 U.S. 95 (2012), is illustrative. There, individuals who had agreed to arbitrate their disputes with a credit-card company filed a class-action complaint in federal court under the Credit Repair Organizations Act (CROA), 15 U.S.C. 1679 *et seq.* See 565 U.S. at 96. When the defendants moved to compel arbitration under the FAA, the plaintiffs invoked various CROA provisions that required disclosure of a consumer's "right to sue" for statutory violations, *id.* at 99 (quoting 15 U.S.C. 1679c(a)); imposed liability for violations and "repeated[ly]" used "the terms 'action,' 'class action,' and 'court,'" *id.* at 100 (quoting 15 U.S.C. 1679g); and declared that "[a]ny waiver by any consumer of * * * any right of the consumer under" CROA would be "void" and unenforceable, *id.* at 99 (quoting 15 U.S.C. 1679f(a)).

The Court found those provisions insufficient to demonstrate that Congress intended to preclude enforcement of the plaintiffs' agreement to arbitrate their statutory claims. The disclosure provision (Section 1679c(a)) created no consumer right other than "the right to receive the [disclosure] statement" itself. *CompuCredit*, 565 U.S. at 99. The liability provision (Section 1679g) was merely a "guarantee of the legal power to *impose* liability," not a guarantee of access to any particular forum. *Id.* at 102 (emphasis omitted). And because neither of those provisions entitled a consumer to proceed in court, there

was no "right of the consumer" to which the non-waiver provision (Section 1679f(a)) might apply. *Id.* at 101-102 (citation omitted). The Court concluded that CROA was "silent on whether claims under the Act can proceed in an arbitral forum," and it accordingly held that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 104.

CompuCredit demonstrates the formidable burden a party bears when seeking to show that "the FAA's mandate has been 'overridden by a contrary congressional command.'" 565 U.S. at 98 (quoting *McMahon*, 482 U.S. at 226). One feature of *CompuCredit* and other decisions is especially notable for present purposes: When examining text and legislative history, the Court has looked for evidence that Congress intended to address arbitration agreements *in particular*. A statute's general reference to litigation rights, even when combined with a provision forbidding the waiver of statutory protections, is insufficient to overcome the FAA's presumption of enforceability. See, *e.g.*, *id.* at 99-102; *Rodriguez de Quijas*, 490 U.S. at 481-482; *McMahon*, 482 U.S. at 227-228.

2. The NLRA does not contain a specific congressional command precluding enforcement of plaintiffs' bilateral arbitration agreements

a. Plaintiffs in these cases have not argued, and neither the Seventh nor the Ninth Circuit suggested, that *the FLSA* precludes enforcement of the agreements at issue here. Although the FLSA authorizes suit "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. 216(b), that provision is no different from other "utterly commonplace" provisions that "describe the details of * * * causes of action, including the relief

available, in the context of a court suit," *CompuCredit*, 565 U.S. at 100. "[M]ere formulation of the cause of action in this standard fashion" is not "sufficient to establish [a] 'contrary congressional command' overriding the FAA." *Id.* at 100-101 (quoting *McMahon*, 482 U.S. at 226); see *NLRB* v. *Alternative Entm't, Inc.*, No. 16-1385, 2017 WL 2297620, at *13 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part) ("Every circuit to consider the question has concluded that an employee may waive the right to bring a collective action under the [FLSA].").

Plaintiffs' argument thus depends on the premise that the NLRA imposes greater restrictions on the arbitrability of FLSA claims than does the FLSA itself. Nothing in the NLRA's text supports that proposition. Unlike many federal statutes, the NLRA does not specifically bar enforcement of agreements to arbitrate statutory claims or declare such agreements to be unlawful.[2] Plaintiffs therefore rely on general language in

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[2] See, *e.g.*, 7 U.S.C. 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); 10 U.S.C. 987(e)(3) ("It shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which * * * the creditor requires the borrower to submit to arbitration."); 12 U.S.C. 5567(d)(2) ("[N]otwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section."); 18 U.S.C. 1514A(e)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); see also, *e.g.*, 15 U.S.C. 1226(a)(2); 15 U.S.C. 1639c(e)(1); 22 U.S.C. 290k-11(a); 22 U.S.C. 1650a(a). In addition, Congress has delegated authority to preclude arbitration of certain statutory claims to agencies charged with administering the relevant statutes. See 12 U.S.C.

Section 157, which affirms the "Right of employees as to organization, collective bargaining, etc.," by providing as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.

29 U.S.C. 157.

None of the specific rights enumerated in Section 157 involves the conduct of litigation. And even assuming that the residual phrase—"other concerted activities for the purpose of * * * mutual aid or protection"—encompasses the filing and prosecution of a collective or class suit asserting employment-related claims, see pp. 23-24, *infra*, that language clearly does not *focus* on litigation conduct. Any application that Section 157 may have to employees' litigation activities is much less direct and specific than the statutory language that was at issue in cases like *CompuCredit*, which the Court found insufficient to override the FAA. It is also much less direct and specific than the FLSA provision that authorizes employees to sue "for and in behalf of * * * themselves and other employees similarly situated." 29 U.S.C. 216(b). If that language (in the very statute

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5518(b) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement * * * providing for arbitration of any future dispute between the parties."); 15 U.S.C. 78*o*(*o*) (authorizing the Securities and Exchange Commission to "prohibit, or impose conditions or limitations on the use of, agreements" to arbitrate disputes "arising under the Federal securities laws").

that creates plaintiffs' cause of action) is insufficient to bar enforcement of plaintiffs' agreement to bilateral arbitration of their FLSA claims, it would be anomalous to conclude that the NLRA's more general language has that effect. See *Alternative Entm't*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part).

Neither plaintiffs nor the courts of appeals that ruled in their favor have identified any *other* context in which Section 157 could give employees greater rights to pursue class or collective remedies in court than they would have under the laws that directly address those issues. An employee who sought certification of a plaintiff class, for example, could not invoke Section 157 as a basis for excusing non-compliance with Rule 23's numerosity and commonality requirements. See Fed. R. Civ. P. 23(a)(1) and (2). Rather than *expanding* the collective-litigation rights that employees possess, Section 157 at most provides employees additional protection when they exercise the collective-litigation rights that other laws confer. See pp. 23-25, *infra*. And in determining the scope of the collective-litigation rights that are otherwise available to plaintiffs in these cases, it is essential to take into account the FAA as well as the FLSA. Although the FLSA confers a right to sue, including in a collective action, plaintiffs waived that right by executing arbitration agreements that were valid under the terms of the FAA. Because plaintiffs had no right to pursue collective actions under the FLSA and FAA, any collective-litigation right that Section 157 may confer does not encompass their suits.

The NLRA further provides that an employer who "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" has

committed "an unfair labor practice." 29 U.S.C. 158(a)(1). But that provision simply protects the rights set forth in Section 157, which do not include any collective-litigation right beyond those conferred by other provisions of law. An employer would not commit an unfair labor practice by opposing certification of an employee class on the ground that Rule 23's requirements were not satisfied. By the same token, because Section 157 does not clearly displace the rule announced in the FAA, under which an employee's agreement to bilateral arbitration of workplace disputes is "valid, irrevocable, and enforceable," 9 U.S.C. 2, an employer does not "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" by entering into or enforcing such an agreement, 29 U.S.C. 158(a)(1). Cf. *CompuCredit*, 565 U.S. at 101 ("But if a cause-of-action provision mentioning judicial enforcement does not create a right to initial judicial enforcement, the waiver of initial judicial enforcement is not the waiver of a 'right of the consumer,' § 1679f(a).").

b. The NLRA's legislative history does not suggest that Congress intended to preclude agreements to arbitrate bilaterally. Congress's primary goal in enacting the statute was to "promot[e] industrial peace by the recognition of the rights of employees to organize and bargain collectively." S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935) (Senate Report). Congress focused on "collective bargaining" in the traditional sense of the term—*i.e.*, "the right of employees to bargain collectively through representatives of their own choosing," *id.* at 12—and sought to remove known obstacles such as so-called "company unions," anti-union discrimination by employers, and employer interference with union elections. *Id.* at 9-14; see H.R. Rep. No. 1147, 74th Cong.,

1st Sess. 8-9 (1935). To the extent arbitration was discussed at all, it was only briefly, in making clear that Congress had declined to subject labor disputes to "any form of compulsory arbitration." Senate Report 2; see *id.* at 8 ("The committee does not believe that the Board should serve as an arbitration agency.").

c. Because the question is whether the NLRA contains a specific command from *Congress* precluding bilateral arbitration, the Board cannot supply the requisite clarity by gap-filling. The specific rights enumerated in Section 157 involve self-organization, association with labor unions, and collective bargaining. Plaintiffs' asserted right is very different from those, both because it concerns dispute resolution outside the workplace (whether in litigation or in arbitration) and because, unlike the enumerated Section 157 rights, it cannot plausibly be derived from the NLRA alone but depends on the FLSA's authorization of collective actions. Those differences cast doubt on whether the pursuit of an FLSA collective action is among the "other concerted activities for * * * mutual aid or protection" to which Section 157 refers. See *Murphy Oil* Pet. App. 100a-110a (Miscimarra, Member, dissenting in part); *id.* at 146a-156a (Johnson, Member, dissenting); *Alternative Entm't*, 2017 WL 2297620, at *15-*16 (Sutton, J., concurring in part and dissenting in part).

The Board's interpretation of ambiguous NLRA language is entitled to judicial deference, however, and its reading of Section 157's residual phrase may govern in contexts where the FAA does not apply. For example, an employer may commit an unfair labor practice under Section 158 if it discharges an employee for utilizing collective dispute-resolution mechanisms that are made available by other provisions of law (and that the

employee has not validly agreed to waive). Cf. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978) ("[I]t has been held [by the Board and lower courts] that the 'mutual aid or protection' clause [of Section 157] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.").[3] Construing the NLRA to bar such retaliation would not implicate the FAA, and it would be unlikely to conflict with any other federal law.

But the Board is not entitled to deference when it determines how the NLRA should be harmonized with *other* federal statutes—here, the FAA. Cf. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002) (This Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the

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[3] Contrary to the Board's decision in *Murphy Oil*, see Pet. App. 18a, this statement from *Eastex* does not indicate that employees have an unwaivable right to pursue collective or class claims. The statement relates only to employees' right to be free from "retaliation," not their right to proceed collectively in litigation even if the employees have agreed to bilateral arbitration. The Court in *Eastex* expressly reserved "the question of what may constitute 'concerted' activities in th[e] context" of litigation, 437 U.S. at 566 n.15, because the particular activity at issue there was "distribut[ing] a union newsletter in nonworking areas of [the employer's] property during nonworking time urging employees to support the union," *id.* at 558. The Court in *Eastex* likewise did not address, and these cases do not present, the question whether an employee is protected from retaliation for invoking collective dispute-resolution mechanisms that he reasonably, but incorrectly, believes are legally available to him. Cf. *Alternative Entm't*, 2017 WL 2297620, at *16 (Sutton, J., concurring in part and dissenting in part) ("The employees' pursuit of collective procedures may or may not bear fruit, but the pursuit will nonetheless be protected from retaliation.").

NLRA."). As explained above, the question in these cases is not whether Section 157 provides additional protection for employees who invoke collective-action mechanisms that are available to them under other statutes or procedural rules. At the times they filed suit in these cases, plaintiffs had no FLSA rights to pursue collective actions because they had waived those rights through contracts that were "valid, irrevocable, and enforceable" under the terms of the FAA. 9 U.S.C. 2. The question in these cases is whether Section 157's residual language supersedes that FAA directive and thereby gives plaintiffs *greater* rights to pursue collective litigation than they could assert under the FLSA itself. The Board's determination that the NLRA trumps the FAA in that manner is not entitled to judicial deference.

B. Enforcing The Parties' Arbitration Agreements In These Cases, In Accordance With The FAA, Would Not Deprive Plaintiffs Of Any Substantive Right Conferred By Another Federal Statute

In holding that pre-dispute agreements to arbitrate federal statutory claims are enforceable, this Court has explained that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. The Court has contrasted that type of enforceable contract term with a hypothetical "provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Italian Colors*, 133 S. Ct. at 2310. In holding that the NLRA bars enforcement of the arbitration agreements at issue here, the Seventh and Ninth Circuits viewed those agreements as restricting "substantive" rather than

"procedural" rights. See *Epic* Pet. App. 17a; *E&Y* Pet. App. 14a. That analysis is misconceived.

1. Enforcement of the arbitration agreements at issue here would not deprive plaintiffs of any substantive right under the FLSA. Most obviously, the agreements do not purport to authorize the defendant-employers to engage in conduct inconsistent with the FLSA's wage-and-hour provisions. See 29 U.S.C. 206 (minimum wages); 29 U.S.C. 207 (maximum hours). Nor do the agreements prevent any employee who has suffered a statutory violation from obtaining (through arbitration) the full measure of relief that a court could award.

The Court's decisions also make clear that, for purposes of determining the enforceability of the arbitration agreements at issue here, the right to pursue a collective action under 29 U.S.C. 216(b) is a procedural rather than a substantive FLSA right. A "class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." *Italian Colors*, 133 S. Ct. at 2311. An agreement not to proceed collectively also does not undermine substantive FLSA rights, because collective dispute resolution "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (opinion of Scalia, J.).

2. Enforcement of the parties' arbitration agreements likewise would not deprive plaintiffs of any substantive right under the NLRA. To be sure, the rights enumerated in Section 157—*i.e.*, the rights "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of

their own choosing"—are core substantive rights conferred by the NLRA itself. Plaintiffs in these cases do not contend, however, and the courts below did not suggest, that the arbitration agreements at issue here impair plaintiffs' ability to self-organize, to form or associate with labor organizations, or to engage in collective bargaining.

Section 157's residual phrase confers on employees additional rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Although that residual language could be read to encompass only substantive workplace-related rights closely akin to self-organization or collective bargaining, the Board has construed it more broadly to cover litigation conduct. Assuming that is a permissible interpretation, it does not follow that the right to prosecute a collective action is a *substantive* NLRA right, simply because the enumerated rights are substantive in nature. Rather, if the Board's reading is permissible, it is because the residual phrase can reasonably be construed to cover procedural matters as well as substantive ones. There is no evident reason to treat the right to pursue collective FLSA litigation as "procedural" under the FLSA and yet "substantive" under the NLRA.

3. In reaching the contrary conclusion, the Board incorrectly relied on *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). See *Murphy Oil* Pet. App. 33a, 44a-45a, 67a.

In *National Licorice*, an employer whose employees had recently taken action in favor of a union responded by requiring all employees to sign contracts "relinquish[ing] the right to strike, [and] the right to demand a closed shop or signed agreement with any union."

309 U.S. at 355. This Court concluded that the contracts "by their terms * * * imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by" the NLRA. *Id.* at 360.

In *J.I. Case*, after an employee union was certified, the employer refused to bargain with the union, relying on individual contracts it had signed with its employees. 321 U.S. at 333-334. The Court held that the "[i]ndividual contracts * * * may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement." *Id.* at 337. The Court accordingly ordered the employer to stop using the individual contracts as a ground for declining to bargain collectively. *Id.* at 340-342.

National Licorice and *J.I. Case* did not establish any general rule that "employers may not condition employment on the waiver of employees' right to take collective action by seeking class certification or the equivalent." *Murphy Oil* Pet. App. 33a. Rather, both decisions were highly dependent on a key factual feature that is absent here. The agreements at issue in those cases "were the means adopted to eliminate the Union as the collective bargaining agency of [the] employees." *National Licorice*, 309 U.S. at 360 (internal quotation marks omitted); see *J.I. Case*, 321 U.S. at 337 (The employer "used [the agreements] to forestall bargaining or to limit or condition the terms of the collective agreement."); see also *Murphy Oil* Pet. App. 175a-178a (Johnson, Member, dissenting).

To be sure, the Court in *National Licorice* did say that "[t]he effect of [the anti-union] clause [in the employer-created contracts] was to discourage, if not forbid, any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representatives, or in any way except personally." 309 U.S. at 360. But as the sentence preceding that one makes clear, the Court's concern was that such an agreement would "forestall[] collective bargaining with respect to discharged employees." *Ibid.* The present cases do not implicate that concern. And the Court in *National Licorice* and *J.I. Case* did not confront a situation where another federal statute (like the FAA in the present cases) specifically condoned the employers' conduct.

C. The FAA's Saving Clause Provides No Sound Basis For Declining To Enforce The Parties' Arbitration Agreements

The Seventh and Ninth Circuits relied in part on the FAA's saving clause, 9 U.S.C. 2, which provides that written arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Those courts viewed "illegality" as one of the generally applicable grounds for contract revocation referenced in the saving clause. *Epic* Pet. App. 15a; *E&Y* Pet. App. 14a. They construed the NLRA to "prohibit employers from making agreements with individual employees barring access to class or collective remedies," *Epic* Pet. App. 7a; see *E&Y* Pet. App. 9a-11a, and concluded that such agreements are "illegal, and meet[] the criteria of the FAA's saving clause for nonenforcement." *Epic* Pet. App. 15a; see *E&Y* Pet. App. 14a, 16a-18a; see also *Murphy Oil* Pet. App. 44a. That analysis is incorrect.

1. The congressional policy judgment that the FAA reflects is not simply a preference for an arbitral rather than judicial forum. The FAA mandates enforcement of a "written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. 2. In addition to memorializing the parties' agreement to arbitrate, the "written provision" that the FAA declares to be enforceable can and typically does describe the procedures by which the arbitration will be conducted. Indeed, a principal virtue of contracted-for arbitration is that it allows contracting parties to choose procedures tailored to their own circumstances. See, *e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344-345 (2011).

The FAA thus reflects Congress's belief in "the consensual nature of private dispute resolution," including the freedom of contracting parties "to structure their arbitration agreements as they see fit." *Stolt-Nielsen*, 559 U.S. at 683 (citation omitted). That freedom encompasses the right to "agree on rules under which any arbitration will proceed," including a right of contracting parties to "specify *with whom* they choose to arbitrate their disputes." *Ibid.*; see *Italian Colors*, 133 S. Ct. at 2309. Forcing parties to arbitrate collectively or on a classwide basis, when they have not "*agreed* to do so," is just as inconsistent with the FAA as requiring them to litigate when they have agreed to arbitrate. *Stolt-Nielsen*, 559 U.S. at 684; cf. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 200-201 (1991) (noting "the strong statutory principle, found in both the language of the NLRA and its drafting history, of consensual rather than compulsory arbitration").

2. The saving clause permits courts to "invalidate an arbitration agreement based on 'generally applicable

contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, No. 16-32 (May 15, 2017), slip op. 4 (quoting *Concepcion*, 563 U.S. at 339). The types of generally applicable rules of contract enforceability that the saving clause covers are at least predominantly, if not exclusively, the province of state law.[4] This Court has never applied the saving clause to a case in which another *federal* statute was alleged to render the parties' arbitration agreement unenforceable.

To be sure, the saving clause is not explicitly limited to state-law grounds for contract revocation, and in theory it would cover a (hypothetical) federal law that barred enforcement of contracts on a generally applicable ground like fraud. But the Seventh and Ninth Circuits' interpretation of the NLRA is not that type of arbitration-neutral rule. Those courts viewed their rule as being

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[4] State-law defenses were thus at issue in every case in which this Court has applied the saving clause—or, more commonly, declined to do so because the defense was found to discriminate against arbitration. See, *e.g.*, *Kindred Nursing Ctrs.*, slip op. 4-7 (invalidating defense under Kentucky law that discriminated against arbitration); *Preston* v. *Ferrer*, 552 U.S. 346, 354-356 (2008) (California law); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (Montana law); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 269, 281-282 (1995) (Alabama law); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10, 16 & n.11 (1984) (California law). And in considering and rejecting various claims that other *federal* statutes precluded enforcement of arbitration agreements, the Court has never treated the FAA's saving clause as relevant to its inquiry. See, *e.g.*, *CompuCredit*, 565 U.S. at 99-104; *Randolph*, 531 U.S. at 89-92; *Gilmer*, 500 U.S. at 26-33; *Rodriguez de Quijas*, 490 U.S. at 479-484; *McMahon*, 482 U.S. at 227-242; *Mitsubishi Motors*, 473 U.S. at 628-629; see also pp. 16-17, *supra*.

arbitration-neutral because it focuses on the agreements' requirement of *bilateral* arbitration, rather than on the obligation to arbitrate as such. The Ninth Circuit stated that "[i]t would equally violate the NLRA for [an employer] to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in 'separate proceedings.'" *E&Y* Pet. App. 13a. The Seventh Circuit likewise described the purported flaw in the challenged agreement as its requirement of bilateral dispute-resolution procedures: "If Epic's provision had permitted collective arbitration, it would not have run afoul of Section [157]." *Epic* Pet. App. 17a.

This Court's decisions make clear, however, that the FAA's saving clause does not encompass every rule of contract enforceability that is *capable* of application to contracts other than arbitration agreements. See, *e.g.*, *Kindred Nursing Ctrs.*, slip op. 5-6; *Concepcion*, 563 U.S. at 341-342. The Court in *Concepcion* applied that principle in the specific context of a state-law rule against enforcement of class-action waivers contained in certain consumer contracts. See 563 U.S. at 340 (describing relevant state-law rule). The Court described the ways in which use of class procedures can be expected to subvert the advantages that ordinarily attend arbitration. See *id.* at 348-351. The Court explained that the FAA's saving clause should not be construed "to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" because "the act cannot be held to destroy itself." *Id.* at 343 (citations omitted). It concluded that the FAA preempted the state-law rule barring enforcement of class-action waivers because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of

arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Principles of conflict preemption do not directly govern the interpretive question that is currently before the Court, which involves the proper harmonization of two *federal* statutes. But *Concepcion* underscores that the rule adopted by the Seventh and Ninth Circuits substantially disserves the FAA's purposes, even though that rule would not preclude enforcement of *all* agreements to arbitrate employee claims, and even though it would also preclude enforcement of hypothetical employee-employer contracts that mandated individual suits in court. As the dissenting judge in *Ernst & Young* explained, the rule those circuits found to be implicit in the NLRA "would disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere with fundamental attributes of arbitration.'" *E&Y* Pet. App. 40a (Ikuta, J., dissenting) (brackets omitted) (quoting *Concepcion*, 563 U.S. at 344). Just as the saving clause was held not to encompass the state-law rule at issue in *Concepcion*, it does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the NLRA. See *ibid.* Congress remains free to adopt such a rule, of course, but it must clearly and specifically express its intent to override the FAA's general federal policy—which Congress did not do in the NLRA.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be reversed, and the judgment of the court of appeals in No. 16-307 should be affirmed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ALLON KEDEM
Assistant to the Solicitor General

JUNE 2017

APPENDIX

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

3. 29 U.S.C. 158 provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an

election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or reten-

tion of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of

such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) of this section the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consum-

ers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry

affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representa-

tive of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts,

by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on

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[1] So in original. Probably should be "unenforceable".

the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with

such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3): *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

(g) Notification of intention to strike or picket at any health care institution

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

RECORD AND BRIEFS

Nos. 16-285, 16-300, and 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION
v.
JACOB LEWIS

ERNST & YOUNG LLP, ET AL.
v.
STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD
v.
MURPHY OIL USA, INC., ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

JEFFREY R. WHITE
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW
Washington, DC 20001
(202) 944-2839

DEEPAK GUPTA
Counsel of Record
MATTHEW WESSLER
GUPTA WESSLER PLLC
1900 L Street, NW
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Amicus Curiae

August 16, 2017

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America, was established in 1946 to safeguard victims' rights, strengthen the civil-justice system, and protect access to the courts. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. Throughout its history, AAJ has served as a leading advocate for the right to trial by jury.

AAJ files this brief to demonstrate how the extreme view of the Federal Arbitration Act urged by the employers in this case would, if adopted by this Court, upset decades of settled expectations about the role of arbitration across the economy. This brief draws on AAJ's expertise to inform the Court of the forty years of regulatory actions—by over a dozen federal agencies, under every modern presidential administration—limiting arbitration to protect federal statutory rights. Because AAJ has taken part in many of these rulemakings through the notice-and-comment prccess, it has considerable expertise when it comes to federal agency regulations on arbitration.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

For over forty years, federal agencies have written rules limiting or regulating the use of arbitration. Over a dozen agencies have done so, under presidential administrations led by both political parties, to protect the statutory rights of investors, military servicemembers, farmers, airline passengers, nursing-home patients, and others. Some of these agencies have deployed their statutory authority to craft broad, generally applicable rules, while others have placed conditions on the receipt of federal funds or other voluntary decisions by regulated entities. These rules have engendered considerable reliance across all sectors of our economy.

Thirty years ago, this Court unanimously recognized that a federal agency may employ its delegated statutory authority—even if that authority says nothing specific about arbitration—to adopt "rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1884 (2013) (explaining that, when Congress delegates to an agency a "general conferral of rulemaking authority," the "whole includes all of its parts"). This Court's later FAA decisions have in no way undercut that recognition or otherwise addressed the interplay between agencies and the FAA. *But cf. CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012) (addressing the markedly different question whether Congress *itself* has decided to prohibit arbitration).

Although this case does not involve a direct challenge to any federal regulation, this Court should nonetheless be mindful of the many agency regulations—and the

reliance that they have fostered—in reaching its decision. In these three consolidated cases, the question presented is whether employers may require their employees to sign binding agreements waiving their rights to pursue *any* employment claim in *any* forum—judicial or arbitral—on a class basis. More specifically: Is the enforcement of a binding arbitration agreement that bars employees from pursuing claims on a collective basis mandated by the Federal Arbitration Act, even if that agreement violates substantive protections? And relatedly: Should the FAA be read to displace limits on arbitration that are necessary to protect statutory rights? The employers' answer: yes, to all of the above.

But there is no support, either in this Court's cases or in Congress's enactments, for the employers' position. They seek to rewrite this Court's precedents by crafting a new test for ascertaining the existence of a conflict between a statute and arbitration. Under their test, a conflict exists unless there is an express textual reference to arbitration in the statute. Without that reference, they effectively argue, no agency action regulating, defining, or limiting arbitration is permissible. But, following its enactment in 1925, the FAA has never been read to alter the established view that a general delegation of authority may empower an agency to write rules limiting or conditioning arbitration.

The employers' contrary view threatens dozens of vital and lawful regulations as well as the settled view of the FAA. In light of statutory *stare decisis* principles, this Court should exercise caution, adhere to its prior precedent, and leave room for federal agencies to continue to regulate arbitration where expert regulators conclude that doing so is necessary to protect substantive rights.

ARGUMENT

I. Decades of federal agency regulations governing arbitration have engendered reliance across a range of industries.

The employers urge this Court to adopt a new, unforgiving understanding of how the FAA interacts with agency authority: Unless the text of a federal statute specifically and expressly delegates regulatory authority to the agency over arbitration, no regulation of arbitral procedures is permitted. That unprecedented theory would reach far beyond the boundaries of this case, upsetting the reliance interests of industries regulated under general congressional delegations to numerous federal agencies—including the Departments of Agriculture, Commerce, Education, Health and Human Services, Labor, Transportation, and Treasury, as well as independent agencies such as the Federal Trade Commission and the Securities and Exchange Commission.

As this Court first explained in *McMahon*, an agency's general delegated authority may include the "expansive power" to "mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." 482 U.S. at 233-34. That rule holds true even where—as with the SEC—the agency's substantive statute does not contain any textual reference to arbitration. As a result, agencies have long regulated on the settled understanding that arbitration—no less than any other topic—is subject to an agency's delegated regulatory authority.

A. The SEC has shaped the securities industry's expectations through its broad authority to limit and regulate arbitration.

The SEC, a product of the New Deal, began its oversight of securities arbitration in 1934. *See, e.g.*, Sec. &

Exch. Comm'n, Opinion Letter, Release No. 34-131, 1935 WL 29028 (Mar. 21, 1935). The Maloney Act of 1938 gave the SEC "fairly pervasive authority" to govern entirely new organizations, "in large measure creations of the Congress," whose sole purpose was to provide a mechanism for industry self-regulation.[2] Today, the largest of these self-regulatory organizations (SROs) is the Financial Industry Regulatory Authority (FINRA).[3]

The SEC's active role in the SROs' self-regulation has significantly increased over the past eighty years. Without specifically mentioning arbitration, the 1975 amendments to the Securities and Exchange Act effectively gave the SEC even broader authority to regulate securities arbitration. Congress mandated that "[n]o proposed rule change shall take effect" without the SEC's approval, 15 U.S.C. § 78s(b)(1), and the SEC was authorized to "abrogate, add to, and delete from . . . the rules of a self-regulatory organization," *id.* § 78s(c). As this Court later recognized, this general rulemaking authority gave the SEC an "expansive power to ensure the adequacy of the arbitration procedures employed by the SROs." *McMahon*, 482 U.S. at 233.

Over the following years, the SEC took an even more active role in overseeing and approving the SROs' rules governing arbitral procedures. The SEC, deploying this

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[2] Philip A. Loomis, Jr., Commissioner, Sec. & Exch. Comm'n, Address at the Joint Securities Conference: The Securities Acts Amendments of 1975, Self-Regulation and the National Market System (Nov. 18, 1975), https://perma.cc/9U8X-U2G2.

[3] In 2007, the New York Stock Exchange merged its regulatory and arbitration functions with the National Association of Securities Dealers, which was founded in 1939—forming FINRA. *See* Press Release, *FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority*, Fin. Indus. Reg. Auth. (July 30, 2007), https://perma.cc/MG2P-JCCY.

newly delegated authority, helped form the Securities Industry Conference on Arbitration (SICA)[4] to develop uniform arbitration rules.[5] These efforts resulted in the adoption of a Uniform Arbitration Code by all SROs in 1979,[6] and solidified securities arbitration procedures.

The SEC's authority to regulate arbitration has long included regulation designed to protect investors right to seek classwide relief. The SEC was among the first federal agencies to regulate arbitration to preserve the availability of class action lawsuits.[7] In 1989, the SEC sought a uniform industry position on the proposal that class actions be directed to the courts.[8] And, in January 1992, the Commission approved rules to that end developed by SICA for the Uniform Arbitration Code. *See* 57 Fed. Reg. 52659, 52660 (Nov. 4, 1992). The SEC then endorsed a rule prohibiting FINRA members from

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[4] SICA was formed by a majority of representatives of the investing public (including claimants' lawyers), a securities industry representative, and representatives of various securities regulators. *See White Paper on Arbitration in the Securities Industry*, Sec. Indus. & Fin. Mkts. Ass'n 11 (Oct. 2007), https://perma.cc/KNG8-NRWQ.

[5] Jill I. Gross, *Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 1 J. Dispute Resolution 171, 175–182 (2016).

[6] *See, e.g.*, 44 Fed. Reg. 43377 (July 24, 1979) (Midwest Stock Exchange); 44 Fed. Reg. 43378 (July 24, 1979) (New York Stock Exchange); 44 Fed. Reg. 75255 (Dec. 19, 1979) (National Association of Securities Dealers, Inc.).

[7] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 45 (2000).

[8] *SEC Approves Arbitration Summaries, Other Revisions to Industry Programs*, 21 Sec. Reg. & L. Rep. (BNA) 683, 684 (May 12, 1989).

compelling arbitration against members of certified or putative class actions. 57 Fed. Reg. 30519, 30520 (July 9, 1992). Under that rule, any arbitration agreement must "clearly state that class action claims are specifically outside the scope of arbitration contracts." *Id.* Following that rulemaking, the SEC reviewed and approved parallel changes to the other SROs' internal rules.[9]

In the thirty years since *McMahon* first embraced the SEC's power to regulate the role of arbitration, the agency has engaged in multiple rounds of arbitration-related rulemakings. In 1999, for example, the Pacific Stock Exchange made arbitration for certain employment-related claims subject to the parties' continued agreement to arbitrate. *See* 64 Fed. Reg. 25096, 25097 (May 10, 1999). More recently, FINRA revised and rewrote in plain English the Uniform Arbitration Code. *See* 72 Fed. Reg. 4574, 4580 (Jan. 31, 2007). And, in 2012, the SEC approved a rule change to clarify that collective actions brought by employees of member firms under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act may not be arbitrated. *See* 77 Fed. Reg. 22374 (Apr. 13, 2012).

For twenty-five years, every FINRA member has complied with and relied upon this regime.[10] Thanks to the SEC's oversight, financial markets have long operated under this dispute-resolution framework: class actions

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[9] *See, e.g.*, 58 Fed. Reg. 48680 (Sept. 17, 1993) (American Stock Exchange); 58 Fed. Reg. 42588 (Aug. 10, 1993) (Pacific Stock Exchange); *see also* 59 Fed. Reg. 4299 (Jan. 31, 1994) (clarifying that the exclusion of class action claims from FINRA arbitration applies to actions brought by employees as well as by customers).

[10] *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 Stan. J. Complex Litig. 1, 24–29 (2012).

in courts, individual actions in arbitration. Because, "[a]s a practical matter, all securities firms dealing with the public must be members of FINRA," *Fiero v. FINRA, Inc.*, 660 F.3d 569, 571 (2d Cir. 2011), the entire securities industry abides by the FINRA rules—including its arbitration regulations and its rules preserving the right to sue on a class basis, *see* FINRA By-Laws, Art. IV. But the SEC's regulation in this area, and the securities industry's reliance on it, represents just a fraction of the agency arbitration rules threatened by an unnecessarily expansive ruling in this case.

B. Many other federal agencies have solidified industry expectations by acting on their broad authority to limit and regulate arbitration.

When it comes to arbitration, the SEC is far from alone. In rules designed to protect farmers, students, airline passengers, workers, and nursing-home patients, among others, dozens of federal agencies have long regulated arbitration within the statutory schemes that they oversee. Their goal has been to ensure fulfillment of their congressional mandates by securing fair dealing among industry participants and meaningful forms of redress for aggrieved parties. Some agencies have regulated arbitration in general terms. And others have made the availability of benefits or funding conditional on specific limits on arbitration, such as preserving the right to bring class actions.

Like their counterparts in the securities sector, these regulators have relied on the understanding that arbitration falls comfortably within an agency's general congressional delegation. Even if an agency's substantive statute says nothing about arbitration, a general congressional delegation constitutes "sufficient statutory authority" to adopt any rules "necessary to ensure that

arbitration procedures adequately protect statutory rights." *McMahon*, 482 U.S. at 234, 238.

Since *McMahon*, these regulations have been neither controversial nor novel: From Ford to Obama, agencies under every administration have promulgated rules designed to regulate the use of arbitration across a broad range of industries. And these decades of tailored regulatory action have solidified the "reliance interests of regulatees who conform[ed] their conduct to th[os]e regulations." *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

1. To start, various federal agencies have regulated arbitration by relying on their general authority to protect statutory rights of various parties.

Car Buyers. The Federal Trade Commission has for twenty years written rules restricting the use of pre-dispute forced arbitration clauses in auto warranty agreements, invoking its statutory authority under the Magnuson-Moss Warranty Act to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure." *See* 15 U.S.C. § 2310(a)(2); *see also* 40 Fed. Reg. 60168, 60190 (Dec. 31, 1975); 64 Fed. Reg. 19700, 19708 (Apr. 22, 1999); 80 Fed. Reg. 42710 (July 20, 2015). This limitation has engendered vast reliance across the auto industry, which has relied on non-binding arbitration for at least a decade.[11]

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[11] *See, e.g.*, *National Center for Dispute Settlement (Automobile Warranty Arbitration Program) 2015 Audit*, U.S. Fed. Trade Comm'n 4 (2016) (finding arbitration of Chrysler, Honda, Mitsubishi, Suzuki, Tesla, and Toyota in compliance with FTC rules), https://perma.cc/RR38-KG5M; *National Center for Dispute Settlement (Automobile Warranty Arbitration Program) 2008 Audit*, U.S. Fed. Trade Comm'n 4 (2009), https://perma.cc/3XKZ-KMMH (same).

And car manufacturers have embraced the goals of the FTC's regulation to the point of voluntarily exceeding its baseline requirements and making arbitration binding on manufacturers.[12]

Airline Passengers. Consumer-protection rules have also allowed domestic air travelers—such as David Dao, the passenger recently dragged off an overbooked United Airlines jet—to obtain legal recourse against the airlines.[13] The Department of Transportation, relying on its broad authority to prohibit "unfair or deceptive practice[s]," 49 U.S.C. § 41712(a), has banned any restriction on passengers' right to sue airline carriers, 76 Fed. Reg. 23110, 23155 (Apr. 25, 2011). And because the industry has been drafting its carriage contracts accordingly,[14] passengers have been able to vindicate their legal rights in court.

Students. Recognizing that unscrupulous and fraudulent for-profit educational institutions have

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[12] *See supra* 2009 Audit at 28 (noting that arbitration is "binding on participating manufacturers but not on the consumer"); Marc Winermar, *2015 Audit of BBB Auto Line*, Better Bus. Bureau 2, https://perma.cc/QD9F-QJEC (2016) ("Manufacturers participating in BBB Auto Line [including Bentley, Ford, General Motors, Hyundai, Kia, Mazda, Nissan, and Volkswagen] exceed Federal (and some state) requirements in a profoundly important way: although the consumer isn't bound by the results of arbitration, manufacturers are bound so long as consumers accept those results.").

[13] *See* Daniel Victor & Christopher Drew, *United Airlines Reaches Settlement With Passenger Who Was Dragged Off Plane*, N.Y. Times (Apr. 27, 2017), http://nyti.ms/2qbJcsn.

[14] *See, e.g.*, *International General Rules*, Am. Airlines (2017), https://perma.cc/ZNS8-NQZ9; *Domestic General Rules Tariff*, Delta (June 21, 2017), https://perma.cc/U365-NW3S; *Contract of Carriage*, JetBlue Airways (May 16, 2017), https://perma.cc/5HQN-YU28; *Contract of Carriage Document*, United Airlines (June 23, 2017), https://perma.cc/JJV4-UMGC.

drained tens of billions of dollars in taxpayer money, [15] the Department of Education has recently streamlined its borrower-defense rules and procedures. Under its broad authority to define defenses against the repayment of a loan, 20 U.S.C. § 1087e(h), the Department has prohibited schools participating in its direct loan program from entering into pre-dispute agreements that mandate arbitration or waive students' right to participate in class actions lawsuits, 81 Fed. Reg. 75926 (Nov. 1, 2016). And following the promulgation of the rule, lenders have adjusted their practices accordingly.[16]

Employee Benefits. Regulators have also stepped in where they have seen a risk that stronger parties will impose unfair procedures.[17] The Department of Labor, for example, has issued a rule under ERISA to ensure "full and fair review" of an adverse-benefit decision. 29 U.S.C. § 1133(2). Workers who are denied benefits under plans covered by Title I of ERISA may not be subjected to mandatory arbitration unless they are allowed to challenge the arbitral decision. 65 Fed. Reg. 70246, 70253 (Nov. 21, 2000).

Farmer's Insurance. To ensure a fair and efficient insurance marketplace, the Department of Agriculture

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[15] *See For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, Health, Education, Labor and Pensions Committee (July 30, 2012), https://perma.cc/4PY2-9HTZ.

[16] *See, e.g.*, Stephen Wagner, *The Department of Education lays out new borrower defense to repayment regulations*, University Risk Mgmt. & Insurance Ass'n (Jan. 10, 2017), https://perma.cc/CTP9-LK79.

[17] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1 Wis. L. Rev. 33 (1997) (discussing the procedural disadvantages of compelled arbitration for employees).

relied on its general authority to interpret its substantive statute's provision of a right to appeal a denial of a claim, 7 U.S.C. § 1508(j), and clarified that arbitration between insurers and farmers is non-binding, 69 Fed. Reg. 48652, 48654 (Aug. 10, 2004).

Broadband Customers. Other agencies have also begun considering similar rules under their longstanding general rulemaking authority. In December 2016, the Federal Communications Commission stated that it would seek comments on a rule to prohibit broadband internet access service providers from compelling arbitration in their contracts with customers. *See* 81 Fed. Reg. 87274, 87318 (Dec. 2, 2016); *see also* 81 Fed. Reg. 23360, 23393 (Apr. 20, 2016).

2. In recent years, agencies have also increasingly limited arbitration through conditional rules.

Nursing-Home Residents. The Department of Health and Human Services has issued regulations designed to help the families of those, like Richard Embry, who suffered from fatal neglect and were unable to obtain legal recourse.[18] In acting to limit arbitration in nursing homes, HHS invoked its general delegated authority to require that a facility "meets" certain "requirements" in order to receive Medicare or Medicaid funds. 42 U.S.C. § 1396r(a)(3). As a result of the Nursing Home Reform Act, a nursing facility receiving federal funds "must" agree to "protect and promote the rights of each resident" by complying with a list of substantive and procedural "Residents' Rights." 42 U.S.C. § 1396r(c)(1)(A). The agency decided that, to qualify for

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[18] *Worker and Consumer Advocates Call on Congress to Pass the Arbitration Fairness Act and Stop Forced Arbitration*, Public Citizen (May 7, 2013), https://perma.cc/BBU8-RLRW.

federal funds, a nursing facility may enter into an arbitration agreement with residents only after a dispute has arisen. *See* 81 Fed. Reg. 68688 (Oct. 4, 2016).[19]

Retirement Investors. Similarly, Congress gave general authority to the Department of Labor, through ERISA, to "grant a conditional or unconditional exemption of any fiduciary or transaction." 29 U.S.C. § 1108(a). To be eligible for an exemption from a rule regarding conflicts of interest in retirement advice, investment advisors and others covered by the rule may not limit their customers' "right to participate in a class action in court" but may otherwise require arbitration. *See* 81 Fed. Reg. 21002, 21020 (Apr. 8, 2016). In enacting this rule, the agency concluded that the "ability to bar investors from bringing or participating" in a class action "would undermine important investor rights and incentives for Advisers to act in accordance with the Best Interest standard." *Id.* at 21043.[20]

Foreign Exchange Customers. Agencies have also promulgated conditional rules to ensure the efficiency of the financial markets. Following the enactment of the Dodd-Frank Act, the Treasury Department limited the arbitration of disputes arising out of foreign-currency off-exchange transactions with retail customers. Congress authorized the agency to allow off-exchange transactions only if subject to certain restrictions of its choosing. 7 U.S.C. § 2(c)(2)(E)(ii)(I). Even though the statutory authority was silent on arbitration, the Federal Deposit Insurance Corporation allowed these transac-

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[19] The Department has recently proposed revisions to the rule. 82 Fed. Reg. 26649 (June 8, 2017).

[20] *See also* 82 Fed. Reg. 31278 (July 6, 2017) (seeking public input on whether to delay in the January 1, 2018, applicability date of the DOL fiduciary rule).

tions on the condition that there be no pre-dispute arbitration agreements between customers and state banks. 76 Fed. Reg. 40779, 40787 (July 12, 2011). *Cf.* 76 Fed. Reg. 41375, 41381 (July 14, 2011) (Office of the Comptroller of the Currency rule prohibiting national banks and federal branches of foreign banks from mandating arbitration).

C. A lack of agency action has also prompted Congress, in some cases, to specifically mandate limits on arbitration.

In addition to the actions described above, a lack of agency regulation has in some cases led Congress to explicitly mandate that agencies take steps to regulate arbitration. In 2006, for example, Congress reacted to reports finding that military servicemembers were being targeted by predatory lenders to such an alarming degree that their activities constituted a threat to national security.[21] Congress's response was the Military Lending Act, which bans forced arbitration in consumer loans to servicemembers. *See* 10 U.S.C. § 987(e).[22] Simi-

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[21] *See Report On Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, Dep't of Defense (Aug. 9, 2006), https://perma.cc/UJ8Z-2SG9; *see also* Christopher Lewis Peterson & Steve Graves, *Predatory Lending and the Military: The Law and Geography of 'Payday' Loans in Military Towns*, 66 Ohio State L.J. 653 (2005).

[22] The Department of Defense has exercised its authority to issue regulations expanding the scope of that ban, *see* 80 Fed. Reg. 43560 (July 22, 2015), and the lending industry has taken steps to comply. *See Military Lending Act: Great Expectations in Compliance*, Carolinas Credit Union League (2016), https://perma.cc/25CG-HYSG (discussing the DOD's rule); *Military Lending Law Developments*, Utah Bankers Association (Oct. 25, 2016), https://perma.cc/T6YG-RYZ6 (same); Tony Hadley, *Must-Know Details About the Military Lending Act in 2016*, Experian (Feb. 29, 2016), https://perma.cc/7BJB-9JGD; *Attention! Military Lending Act*

larly, when Congress created the new Consumer Financial Protection Bureau, it responded to the lack of action by existing financial regulators to halt the spread of forced arbitration by requiring the new agency to study the problem and, if warranted, to limit it.[23]

The lesson to be drawn from these more specific congressional delegations is *not* that such delegations are necessary (as opposed to sufficient) for agency action. Agencies often already have the authority to act by virtue of the substantive laws they administer. Rather, it is when Congress seeks to *mandate* limits on arbitration that it has "done so with a clarity that far exceeds" a general statutory delegation. *CompuCredit*, 565 U.S. at 103 (addressing what statutory language is necessary to discern an intent to "prohibit" arbitration agreements).

II. The employers' novel reading of the FAA cannot be reconciled with *McMahon* and decades of agency rulemaking.

The employers principally stake their case on the theory that the National Labor Relations Act and Norris-LaGuardia Act's do not grant employees a substantive right to pursue employment-related claims on a collective-action basis. That theory is unfounded for the

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Compliance, Microbilt (2016), https://perma.cc/98SA-E38J; *see also Promissory Note*, Discover 3 (May 2017), https://perma.cc/4M9R-7S3D ("[T]his section, Arbitration of Disputes, does not apply if . . . you are covered by the federal Military Lending Act.").

[23] *See* 12 U.S.C. § 5518 (mandating that the agency conducts a study to assess the impact of arbitration on consumers and authorizing it to prohibit or limit arbitration if it found that doing so would be "in the public interest and for the protection of consumers"); 81 Fed. Reg. 32830, 32830 (May 24, 2016) (adopting a rule to "prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court" and require companies "to submit certain records relating to arbitral proceedings to the Bureau").

reasons set forth in the employees' and NLRB's briefs. *See* AFLCIO Br. 9-28; Lewis Br. 9-25; Morris & McDaniel Br. 14-30; NLRB Br. 11-35.

But the challengers also press a second-line argument that is both broader and less precise. Under the employers' view, agencies that regulate under general statutory grants of rulemaking authority would, in effect, be categorically prohibited from promulgating rules that regulate the role of arbitration. *See* Chamber of Commerce Br. 21, 31; Ernst & Young Br. 50; *see also* Murphy Oil Br. 11. That theory, however, is squarely foreclosed by this Court's decision in *McMahon*.

A. *McMahon* held that the FAA does not interfere with an agency's broad authority to regulate arbitration under a general grant of rulemaking authority.

Thirty years ago, this Court recognized that a federal agency does not run afoul of the FAA's pro-arbitration policies when it employs its general authority delegated from Congress to regulate and restrict arbitration procedures where "necessary or appropriate to further the objectives" of a federal statute or to "protect statutory rights." *McMahon*, 482 U.S. at 233–34. That recognition—which has never been overturned or called into question by this Court—forecloses the employers' unduly cramped view of agency authority here.

In *McMahon*, the SEC's congressionally delegated authority to regulate was general—it said nothing specific about arbitration—and yet this Court definitively ruled that the congressional grant of authority nonetheless gave the SEC "expansive power" and "broad authority" to regulate "arbitration procedures." *Id.* at 223. That authority, the Court explained, readily allowed the agency to "mandate the adoption of any rules [the

SEC] deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Id.* at 234 (concluding that Congress's general-delegation clause afforded the agency "sufficient statutory authority" for this sort of regulation). And the Court blessed the SEC's authority in this respect notwithstanding the FAA's "federal policy favoring arbitration." *Id.* at 226.

Not surprisingly, then, FAA-based challenges to the SEC's rulemaking authority since *McMahon* have been soundly rejected. *See Charles Schwab & Co. v. FINRA*, 861 F. Supp. 2d 1063 (N.D. Cal. 2012); *In re Dep't of Enforcement v. Charles Schwab & Co.*, 2014 WL 1665738 (FINRA Bd. Apr. 24, 2014). And this Court has never suggested that a federal program offends the FAA merely by encouraging participants in the program to forgo arbitration or placing conditions on its use. Indeed, as we explained in Part I, many agencies—no different than the SEC—have long exercised similar regulatory authority under general-delegation clauses that span the U.S. Code.

In this respect, the Court's decision in *McMahon* enshrined a basic (and still controlling) principal of agency authority: that the question in every case involving an agency's power to regulate "is, simply, whether the statutory text forecloses the agency's assertion of authority, or not." *City of Arlington*, 133 S. Ct. at 1871. *McMahon*, in other words, recognized that, when it comes to agency rulemaking, "the whole includes all of its parts." *Id.* at 1874. A "general conferral of rulemaking authority," in other words, "validate[s] rules for *all* the matters the agency is charged with administering." *Id.*

Yet, embracing the employers' broadside attack on this settled and uncontroversial rule of administrative law would unavoidably require overruling *McMahon*

and, in the process, upset four decades of agency practice.

B. *CompuCredit* does not undermine *McMahon*.

The employers rest their sweeping attack on the longstanding framework governing agency regulation on this Court's decision in *CompuCredit*. That case, they argue, established a new rule of agency law—that a clear, arbitration-specific statutory grant of rulemaking authority is required before an agency may engage in rulemaking that addresses arbitration. *See, e.g.*, Ernst & Young Br. 50; Chamber of Commerce Br. 21, 31; Murphy Oil Br. 11.

But *CompuCredit* erected no such rule for a simple reason: the case did not implicate any agency regulation. To the contrary, the only question *CompuCredit* addressed was how to discern when Congress has *itself* decided to prohibit arbitration. Specifically, the case addressed whether a statute—the Credit Repair Organizations Act—contained a sufficiently clear "contrary congressional command" to override the presumption that CROA-related statutory claims may be validly arbitrated. *See* 565 U.S. at 98. And, because nothing in CROA's text, legislative history, or underlying purposes evinced a clear intent to bar claims from proceeding in arbitration, the Court concluded that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 104 (citing, without limitation, *McMahon*'s test for determining whether a statute overrides the FAA's mandate). But what *CompuCredit* did not do was announce a new and unprecedented rule of agency law.

C. Respect for statutory *stare decisis* and settled reliance weigh against adoption of the employers' sweeping reading of the FAA.

There are other reasons to reject the employers' bid for such a radical departure from settled precedent. *Stare decisis*, the "foundation stone of the rule of law," *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014), carries "enhanced force" in statutory interpretation cases like this one. *Kimble v. Marvel Entm't, Inc.*, 135 S. Ct. 2401, 2409 (2015). As this Court explained just two Terms ago in *Kimble*, so long as there is a "reasonable possibility that parties have structured their business transactions" according to preexisting law, it should be left to stand. *Id.* at 2410. And that lesson is particularly true, this Court stressed, in cases that involve "contract rights." *Id.* In this context, "considerations favoring *stare decisis* are at their acme." *Id.* (internal quotation marks omitted). To trump this "superpowered form of *stare decisis*" requires a "superspecial justification." *Id.*

Here, overruling statutory precedents and replacing the settled principles governing agency rulemaking would spark profound confusion across industries. Overnight, regulations promulgated by over a dozen agencies under their general delegated statutory authority could become infirm, jeopardizing the settled expectations and reliance interests of farmers, students, airline passengers, workers, and nursing-home patients alike. Those stakeholders in the financial industry, too, would be out to sea. As a matter of *stare decisis*, endorsing the employers' sweeping view—and the real-world consequences that would follow—would be unwarranted. But, the employers' invitation to do so in this case is all the more inappropriate given that the case before the

Court here does not involve a challenge to a regulation at all.

Ultimately, the employers offer no reason at all—let alone any "superspecial justification"—to effectively overrule either *McMahon* or decades of settled agency practice and longstanding agency rules.

CONCLUSION

The judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300 should be affirmed, and the judgment of the Fifth Circuit in No. 16-307 should be reversed.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
MATTHEW WESSLER
GUPTA WESSLER PLLC
1900 L Street, NW
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

JEFFREY R. WHITE
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW
Washington, DC 20001
(202) 944-2839

Counsel for Amici Curiae

August 16, 2017

RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG, LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS AND KELLY McDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth And Fifth Circuits

BRIEF OF THE AMERICAN STAFFING ASSOCIATION, TRUEBLUE, INC., RESTAURANT LAW CENTER, NEW YORK STAFFING ASSOCIATION, STAFFMARK, ON ASSIGNMENT, INC. AND BELFLEX STAFFING NETWORK, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS EPIC SYSTEMS CORPORATION, ERNST & YOUNG, LLP, ERNST & YOUNG U.S., LLP, AND RESPONDENT MURPHY OIL USA, INC.

GARRETT R. FERENCZ
TIMOTHY O'DONNELL
1015 A Street
Tacoma, Washington 98402
Counsel for Amicus Curiae TrueBlue, Inc.

MELISSA A. SIEBERT
BONNIE K. DELGOBBO
BAKER & HOSTETLER, LLP
191 North Wacker Drive, Suite 3100
Chicago, Illinois 60606

JOHN B. LEWIS
Counsel of Record
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
Key Tower, Suite 2000
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

Counsel for Amici Curiae
[Additional Counsel Listed On Inside Cover]

STEPHEN C. DWYER
277 S. Washington Street,
Suite 200
Alexandria, Virginia 22314
Counsel for Amicus Curiae
American Staffing
Association

JASON B. KLIMPL
370 Lexington Avenue,
Suite 902
New York, New York 10017
Counsel for Amicus Curiae
New York Staffing
Association

KATHRYN S. BERNARD
435 Elm Street, Suite 300
Cincinnati, Ohio 45202
Counsel for Amicus Curiae
Staffmark

CRAIG S. HOPEWELL
11591 Goldcoast Drive
Cincinnati, Ohio 45249
Counsel for Amicus Curiae
BelFlex Staffing Network,
LLC

ANGELO I. AMADOR
2055 L Street, N.W.
Washington, D.C. 20036
Counsel for Amicus Curiae
Restaurant Law Center

KEVIN W. SHAUGHNESSY
JOYCE ACKERBAUM COX
BAKER & HOSTETLER, LLP
Sun Trust Center,
Suite 2300
200 South Orange Avenue
Orlando, Florida 32801

JENNIFER HANKES PAINTER
26745 Malibu Hills Road
Calabasas, California 91301
Counsel for Amicus Curiae
On Assignment, Inc.

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INTEREST OF *AMICI CURIAE*[1]

The American Staffing Association ("ASA") is the leading voice for the staffing, recruiting and workforce solutions industry ("staffing industry"). The staffing industry makes a significant contribution to the American economy, providing job and career opportunities for nearly 15 million employees per year. Three million Americans are employed by the staffing industry in any given week. More than one-third of staffing industry employees work in occupations requiring higher education and specialized skills. The average wage rate for staffing industry employees exceeds $17 per hour. Most (76%) of these employees work full time. Employees seek staffing industry employment to increase marketable skills, to obtain a pathway to permanent employment, or because they prefer flexible work schedules. The ASA has over 1,500 staffing industry members who have more than 17,000 offices throughout the United States, and who represent a majority of the revenue in the U.S. staffing industry.

The New York Staffing Association ("NYSA"), an ASA-affiliated chapter, represents the staffing industry within the State of New York. NYSA members place over half a million workers on temporary and contract assignments each year, creating routes to

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[1] Pursuant to Rule 37.6 *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or counsel made a monetary contribution to its preparation or submission. All parties, except the Solicitor General, have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk. The Solicitor General has provided a letter consenting to the filing of this brief.

meaningful employment and substantial economic benefits to the New York region. Individual arbitration agreements and class action waivers are critical to the economic well-being of ASA members, including the NYSA who rely on the efficiency and flexibility of single-plaintiff arbitration to resolve employee claims. Staffing industry clients are other businesses that seek to quickly and effectively increase staffing required by busy periods, major projects or overall growth. Staffing companies provide a competitive edge in matching resources and payroll to business needs, creating a more flexible, agile workforce that is valued in the American economy.

TrueBlue, Inc. ("TrueBlue") is a significant member of the staffing industry known for providing high-quality, flexible workforces to clients. In 2016, TrueBlue connected over 815,000 people with work through its staffing, on-site workforce management and recruitment process outsourcing services. TrueBlue focuses on blue-collar industrial employment, which serves as a bridge from unemployment or underemployment, and provides training for higher paying jobs. Last year alone, TrueBlue's blue-collar divisions placed 349,087 employees with over 121,440 businesses across our nation. Additionally, TrueBlue is the leading recruiter of U.S. military veterans, placing more military veterans in full-time employment than any other recruiting firm.

TrueBlue has a long-standing practice of entering into individual arbitration agreements with its employees containing class and collective action waivers.

The agreements embody TrueBlue's philosophy of addressing employee disputes directly, promptly and efficiently. Generally, these agreements provide that in disputes involving less than $10,000, TrueBlue will pay all arbitration filing fees, and the employee can choose a less expensive, streamlined arbitration process. TrueBlue's individual arbitration agreement has been challenged in several lawsuits that have also sought to add TrueBlue's clients as parties, in an apparent effort to pressure TrueBlue into class or collective settlements. The agreement also has been challenged before the National Labor Relations Board, where the Board ordered, in part, that a TrueBlue subsidiary cease using a mandatory arbitration agreement with a class or collective action waiver. *See Labor Ready Sw., Inc., a subsidiary of TrueBlue, Inc. and Jason Kuller, Esq. of Thierman Law Firm, P.C.*, Case No. 31-CA-072914, 363 NLRB No. 138, 2016 NLRB LEXIS 159 (Feb. 26, 2016). The Petition for Review of that order to the District of Columbia Circuit remains pending, and has been stayed along with other arbitration-related cases pending before the D.C. Circuit until this Court decides the Consolidated Cases.[2] TrueBlue thus has a direct interest in the outcome of these pending Supreme Court appeals, since the majority of its large workforce is subject to

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[2] For convenience, *Amici* refer to the consolidated cases, *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *National Labor Relations Board v. Murphy Oil USA*, No. 16-307 as the "Consolidated Cases."

mutually-agreed upon, individual arbitration agreements containing class and collective action waivers.

Staffmark is one of the United States' top ten staffing companies, providing innovative solutions for approximately 4,500 customers, in 30 states. Staffmark provides job opportunities and payroll for an average of 40,000 employees each week and is a solutions-driven partner in industries ranging from administrative and office to information technology. It operates in the Seventh, Fifth and Ninth Circuits, and thus has a direct interest in resolving this Circuit split regarding the enforceability of class action waivers in the employment context. A decision on these cases will provide Staffmark with certainty as to the enforceability of its agreements nationwide.

On Assignment, Inc., located in Calabasas, California, is one of the ten largest staffing firms in the United States primarily providing highly-skilled professionals for in-demand jobs in the technology, digital, creative, healthcare technology, and life sciences sectors. In 2016, On Assignment employed over 56,000 individuals, and 95 percent of its revenues came from services provided in the United States. On Assignment uses individual arbitration agreements with class action waivers that have opt-out clauses and thus has a concrete interest in these cases.

BelFlex Staffing Network, LLC is a family-owned light industrial staffing company with 25 offices in twelve states throughout the Midwest and Southeast. Last year, BelFlex placed almost 24,000 individuals

with 700 different employers involved in warehousing, logistics, manufacturing, and assembly operations. BelFlex provides these employees with training and advancement opportunities that might otherwise be unavailable. Indeed, a sizeable percentage of BelFlex's employees transition to full-time employment with clients. BelFlex has a direct interest in these cases so that it can continue to efficiently resolve disputes in individual arbitration, and devote its resources toward its core mission.

Without the ability to resolve disputes efficiently through individual arbitration, staffing industry providers' costs would rise dramatically – facing what this Court described in *Concepcion* as bet the company litigation, with only very limited ability to appeal:

> We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011). The reality is that due to the sheer number of Americans the staffing industry employs, the mere threat of class action litigation can force large settlements, regardless of the merits of the action. These settlement costs could preclude the industry from employing millions, and undoubtedly increase the burden of finding work for some of the most vulnerable American workers.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers.

The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as these, through *amicus* briefs on behalf of its industry.

Many companies in the foodservice industry include arbitration agreements in their employment contracts because arbitration is an efficient means for parties to settle disputes promptly while avoiding the higher costs of traditional litigation. Relying on the Federal Arbitration Act and this Court's decisions, many foodservice establishments, particularly those with large workforces, have structured employment relationships based on agreements that call for individual arbitration. If the position now taken by the National Labor Relations Board were to prevail, it would nullify these arbitration agreements. Hence, the Law Center and its affiliates have vital stakes in these proceedings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, the only branch of government Constitutionally-empowered to make laws, has passed numerous statutes impacting employment relationships in the workplace, including the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA") and the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). But, Congress has not created a hierarchy of these laws. The National Labor Relations Board (the "Board" or "NLRB"), is empowered to enforce only the NLRA. Yet, it has decided to unilaterally undermine express rights in these other federal laws and create new law granting rights to employees that do not exist in any federal law (or this Court's precedent).

When Congress speaks through legislation, it means what it says. "[I]t does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). In these Consolidated Cases, the dispute is about what Congress meant when it enacted not just one statute, but three – the FAA, the NLRA, and the FLSA. Certainly, Congress did not craft the NLRA to be superior to any other federal statute. Nor should this Court.

Each of the Consolidated Cases features wage-and-hour allegations governed by the substantive provisions of the FLSA. The cases cannot, therefore, be resolved simply by analyzing the language of Section 7 of the NLRA to determine if it provides a federal right

to pursue class or collective claims, despite the absence of any textual basis in Section 7 for doing so. Statutory interpretation principles dictate that the procedural rights granted by Section 16(b) of the FLSA delimit the scope of the NLRA. Similarly, mandatory provisions of the FAA govern the extent to which individuals, having waived their procedural rights to collective relief, must arbitrate their FLSA claims, regardless of what the NLRA might say.

This dispute is before this Court because the NLRB – followed by the Seventh and Ninth Circuits – concluded that the NLRA guarantees a non-waivable path to bring collective claims – as if bringing aggregate legal claims were a newfound standalone right. The Board's conclusion, however, fails to account for the actual language Congress used in enacting the FAA, the NLRA, and the FLSA. The NLRB position substitutes policy preferences for statutory language. This result violates several rules of statutory interpretation and cannot be squared with the existence of waivable collective-action rights available under the FLSA and the FAA's individual arbitration mandate.

ARGUMENT

I. Supreme Court Case Law Creates The Framework For Enforcing Arbitration Agreements.

The FAA and this Court's precedents manifest a long-standing "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985). Arbitration agreements are on the same footing as other contracts, and must be "rigorously enforce[d]". *Id.* at 217, 221; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

For more than 25 years, the Court has made clear that employees can waive the right to pursue claims on a class or collective basis. In *Gilmer*, the Court rejected an employee's argument that he could not be forced to arbitrate his claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), in part, because "the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at *conciliation* were intended to be barred." *Id.* at 32 (internal quotation and alteration marks omitted).

Throughout the past decade, the Court has reinforced its long history of enforcing arbitration agreements as written. In 2010, the Court examined significant differences between bilateral and class arbitration, concluding that the "relative benefits of class-action arbitration are much less assured." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662,

685 (2010). Consequently, the Court held "parties may specify *with whom* they choose to arbitrate," and class arbitration is not permitted "unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 683-84.[3]

In 2011, the Court upheld class waivers in consumer arbitration agreements, reversing a Ninth Circuit decision holding these provisions unconscionable under California law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The Court explained "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 344 (internal quotation and alteration marks omitted). Requiring the availability of class arbitration irrespective of the arbitration agreement's language, was inconsistent with the FAA and would "sacrifice[] the principal advantage of arbitration – its informality – and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348, 352.

The following year, the Court held in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) that courts must enforce arbitration agreements according to their

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[3] *See also* Michael Hoenig & Linda M. Brown, *Arbitration & Class Action Waivers Under* Concepcion: *Reason & Reasonableness Deflect Strident Attacks*, 68 ARK. L. REV. 669, 673-87 (2015) (arguing class actions are slow, implicate conflicts of interest between attorneys and class members, have *in terrorem* effect of forcing settlement of unmeritorious claims, and result in smaller recoveries for class members compared to individual actions).

terms, "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* at 669. Specifically, *CompuCredit* suggested statutory language explicitly stating arbitration was unacceptable would be necessary to override the FAA. *Id.* at 672-73 (collecting statutes explicitly referencing arbitration).

The trend continued in 2013 when the Court again upheld arbitration agreements containing class waivers in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013). The Court recognized that while an "effective vindication" exception exists to the FAA's policy of enforcing arbitration agreements according to their terms, this exception applies only when the arbitration agreement would waive a "*right to pursue statutory remedies.*" *Id.* at 2310-11 (internal quotation marks omitted). A class-action waiver merely limiting arbitration to two contracting parties does not qualify for the exception because it leaves access to statutory remedies intact. *Id.*[4]

Thus, to avoid an arbitration agreement containing an explicit class and collective-action waiver, a plaintiff must show either: (1) a clear congressional command overrides the FAA's policy of enforcing arbitration agreements as written, or (2) the "effective

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[4] Citing *Gilmer*, the Court noted it previously had "no qualms in enforcing a class action waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Am. Express*, 133 S. Ct. at 2311.

vindication" exception applies because the arbitration agreement waives the plaintiff's right to pursue statutory remedies. *See Am. Express*, 133 S. Ct. at 2309-12; *CompuCredit*, 132 S. Ct. at 669.

The NLRA contains no contrary congressional command.[5] There is no mention of "litigation" anywhere – much less class or collective litigation – within Section 7. 29 U.S.C. § 157. *See also D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013). Given this statutory silence, Section 7 cannot be read to override the FAA's presumption in favor of enforcing arbitration agreements. *CompuCredit*, 132 S. Ct. at 673; *Gilmer*, 500 U.S. at 32.

Nor does a class and collective waiver extinguish any statutory remedies available under the NLRA. The remedies employees seek to vindicate in class or collective lawsuits are those provided by the state or federal law under which they bring their claims – not the NLRA. Individual arbitration agreements affect only

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[5] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

how plaintiffs may vindicate a right – through individual arbitration – not *whether* they may vindicate it. *See Am. Express*, 133 S. Ct. at 2311 (where the same statutory remedy is available in both individual and class suits, "the individual suit that was considered adequate to assure 'effective vindication' of a federal right . . . did not suddenly become 'ineffective vindication'" just because class procedures were available in a judicial forum) (citing *Gilmer*, 500 U.S. at 32). *See also* Stacey L. Pine, *Employment Arbitration Agreements and the Future of Class-Action Waivers*, 4 AM. U. LAB. & EMP. L.F. 1, 18-24 (2014) (arguing Supreme Court precedent makes clear that class waivers are enforceable).

Amici, in particular, have relied upon this consistent line of case law establishing the primacy of contractual freedom, which clarifies that employment arbitration agreements containing class and collective-action waivers are enforceable. *Amici* and their members have crafted alternative dispute resolution programs establishing arbitration as a less costly, more informal, and quicker means of resolving wage and hour and other employment claims. Arbitration also lessens the burdens of the federal courts. Not only that, *amici* TrueBlue specifically excepts NLRA claims from its arbitration agreements with employees, preserving their right to pursue such claims administratively. The concern created by the Seventh and Ninth Circuits' divergence is more than academic. Workplace expansion requires that employers – the front line of job creation – have an efficient way to resolve minor disputes

without interference from interests that do not benefit their employees or who have a separate profit motivation.[6] This Court's FAA jurisprudence of more than 25 years permitted that efficiency because it outlined the framework for enforcing class and collective-action waivers within arbitration agreements.

Nothing in the NLRA, which contains neither actual class structures, nor a contrary congressional command, changes that analysis. Put another way, in the absence of clear congressional intent, there is no basis

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[6] Frequently, the primary beneficiaries of class litigation are class counsel rather than the class members themselves. *See, e.g.*, John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self interest."). Moreover, § 16(b) actions are among the most commonly-filed types of aggregate litigation because the specter of conditional certification leverages substantial settlement pressure upon defendants. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U.L. REV. 515, 541 (2009) (noting that FLSA conditional certification results in settlement pressure because it "signals the potential expansion of the case and the need for significant and expensive class-wide discovery"); Allan G. King, Lisa A. Schreter, Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 10 (2011) ("Because conditional certification frequently subjects employers to 'mind-boggling' discovery, the costs and resources required to defend a case, even if only 'conditionally' certified, place enormous pressure on employers to settle prior to reaching the second, decertification step.").

for rejecting the benefits of arbitration that have worked well for millions of employers and employees.

II. The FAA Savings Clause Does not Apply to the Consolidated Cases Because Alleged Illegality is Neither Present nor Applicable.

The Circuit split below is largely based on the Ninth and Seventh Circuits' creative but skewed views of Section 2 of the FAA. The savings clause that resides within Section 2 provides a means of avoiding FAA-mandated enforcement of an arbitration agreement only in narrow circumstances related to a dispute about the formation of the underlying arbitration agreement.

The Seventh and Ninth Circuits, however, both read the savings clause far broader than the clear language Congress drafted. In so doing, they condone construing the savings clause to attack valid arbitration agreements by using Board-designed policy on NLRA substantive rights as a sword fatal to *all* class and collective action waivers.[7] This strained reading and unwarranted expansion of a narrow savings clause

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[7] Recently, a divided Sixth Circuit pursued a similar analysis in *NLRB v. Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017). The majority's rationale provoked Judge Jeffrey Sutton to respond in dissent: "If Congress wanted to create unwaivable rights to pursue class actions or other collective lawsuits, it would place that right in the workplace-rights statutes themselves, not in the NLRA in 1935. The Board's theory is worse than assuming Congress would place elephants in mouseholes. It assumes that Congress forgot how to write statutes." (Citations omitted). *Id.* at *16.

applicable only in discrete contract-related situations finds no support in the statutes or the case law. It is not – and cannot be, in effect, re-written by the NLRB or the courts to constitute – an all-encompassing shield against FAA enforcement. Nor does it create a policy-making path for the NLRB's reinterpretation of employee rights under the NLRA.

A. The NLRA Does not Guarantee Workers' Rights to Bring Collective or Class Claims Because the FLSA and Rule 23 Created Those Procedural Rights.

1. The rights to collective and class procedures that are voluntarily waived in arbitration agreements originate in the FLSA and Rule 23 – not the NLRA.

The Board contends that the NLRA's non-waivable "core substantive right" is for employees to pursue collective litigation. *See In Re D.R. Horton, Inc.*, 357 NLRB 2277, 2286 (2012). The Board errs by focusing on the wrong source for those claims. In the Consolidated Cases, the FLSA and Rule 23 provide the class and collective-action vehicles. The NLRA contains no parallel mechanism. At most, if one accepts the Board position, the NLRA may create a substantive *opportunity* to pursue collective litigation.[8]

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[8] The Board, along with the Seventh Circuit, argues that it is merely the opportunity to pursue collective litigation, rather than the right to class certification, that the NLRA protects. *See*,

But in each of the Consolidated Cases, employees *had* the opportunity – and exercised it – to pursue collective actions under the FLSA.[9] In defense of those actions, employers argued that the employee-plaintiffs could not maintain § 16(b) collective actions because the arbitration agreements required individual arbitration. That is, the arbitration agreements enabled the employers to defend against the FLSA's and Rule 23's procedural frameworks for aggregate litigation. They did not infringe upon any concerted activity right under the NLRA.[10] The same, in fact, is true of *amici*

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e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) ("the Board's holding does not 'guarantee[ ] class certification, . . . [but] only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law.' ").

[9] In *Epic Systems*, the employer responded to a hybrid Rule 23 and Section 16(b) action by filing a motion to compel arbitration. The district court denied the motion on the basis that Section 7 rights prevailed over FAA arbitration rights. *Epic Systems*, 823 F.3d at 1151. Effectively the same claims and procedures occurred in *Morris* except that the district court granted the motion to compel individual arbitration, which the Ninth Circuit vacated. *Morris*, 834 F.3d at 990. In *Murphy Oil*, the employer filed a motion to dismiss and compel individual arbitration in response only to a Section 16(b) collective action. While its motion to dismiss and to compel individual arbitration was pending, one of the plaintiffs filed an unfair labor practice charge with the Board, arguing that the arbitration agreement interfered with her Section 7 rights. *Murphy Oil*, 361 NLRB No. 72.

[10] The Board's General Counsel previously recognized this precise distinction in 2010 when he issued a memorandum, recognizing that employer-defendants relying on class waivers in arbitration agreements did not interfere with Section 7 rights. The memorandum explained: "an individual employee's agreement

TrueBlue's arbitration agreements, which expressly inform employees that the agreements wholly preserve their rights to seek relief under the NLRA.

Notably, the NLRA has not been the basis for collective relief in any of the Consolidated Cases. That statute has never provided the substantive claims or procedural framework for collective litigation. Rather, the waivable rights to collective and class litigation exist solely under § 16(b) and Rule 23.

No one even attempts to argue that FLSA and Rule 23 procedural rights cannot be waived. The federal Circuit Courts of Appeal that have directly addressed this question have unanimously held that the collective rights under the FLSA are waivable, procedural rights as long as the waiver is part of an arbitration agreement enabling the employee to vindicate his or her rights on an individual basis. Most recently, the Eleventh Circuit addressed this issue in *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) when citing the unanimous Circuit Courts

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not to utilize class action proceedings in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right." NLRB Gen. Counsel Mem. 10-06 at 6 (June 16, 2010). "[N]o Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and . . . no Section 7 right is violated when that individual agreement is enforced." *Id.* Although the individual employee, of course, "cannot be disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim," "the employer's recourse in such situations is to present to the court the individual *Gilmer* waivers as a defense to the class action claim." *Id.*

in concluding the FLSA does not provide an absolute right to pursue collective actions. *Id.* at 1336 (citing cases from the Second, Fourth, Fifth and Eighth Circuits and noting that "All of the circuits to address this issue have concluded that § 16(b) does not provide for a non-variable, substantive right to bring a collective action.").[11]

This Court, of course, concluded in *Gilmer* that there is no substantive right to class procedures under ADEA, even though the statute provides for aggregation procedures that mimic and are based on § 16(b). *Gilmer*, 500 U.S. at 32; *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, (1989) (noting that the ADEA incorporates its collective action procedures from § 16(b) of the FLSA). And in the context of Rule 23, *American Express* clarified that absent a clear "contrary congressional command" within a statute, there is no basis "to reject the waiver of class arbitration" under the FAA. 133 S. Ct. at 2311.

So even if the NLRA did in some way support the right to pursue collective litigation, it does not contain a contrary congressional command to the FAA that would foreclose an employer from relying on a class waiver in an arbitration agreement to defend against such an action. The procedural rights under the FLSA

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[11] In 2014, the Sixth Circuit acknowledged the validity of this reasoning, but declined to enforce a class waiver "[b]ecause no arbitration agreement [was] present in the case" so there was "no countervailing federal policy that outweighs the policy articulated in the FLSA." *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014).

and Rule 23 are and have always been waivable (unlike the substantive wage and hour protections built into the FLSA). Such valid waivers do not interfere with Section 7 of the NLRA, which does not guarantee success in the face of all obstacles, including class waivers.

2. Harmonizing the NLRA and the FLSA clarifies that the NLRA does not provide a right to maintain a collective or class action.

When Congress passed the NLRA in 1935, neither the actual text of the statute nor the legislative history reflected an intent to guarantee workers a right to class or collective action relief. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (Member Miscimarra, now NLRB Chair, dissenting) ("The Act cannot reasonably be interpreted as giving employees a broad-based right to 'class' treatment under *other* Federal, State, and local laws. Indeed, . . . most of these other laws – and the modern treatment of 'class' litigation – did not even exist until long after the NLRA was enacted.") (emphasis in original). Nevertheless, concern regarding workers' rights to seek relief for wage and hour issues simmered during the 1930s as political and economic forces transformed the American workplace. In response, Congress passed the FLSA in 1938. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (examining the FLSA's legislative history to conclude that there was Congressional intent "to protect certain groups of the population from substandard wages and

excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce").

For the first time, a federal statute granted workers the procedural right to bring collective actions against their employers to enforce their statutory rights under the FLSA.[12] Specifically, the 1938 version of the FLSA empowered a single employee to bring representative actions on behalf of all similarly-situated co-workers to remedy alleged wage-and-hour violations.

Congress inserted the collective action mechanism into the FLSA because there were *no existing collective-action procedures*. After all, Congress does not enact meaningless statutes or insert superfluous

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[12] The legislative history regarding § 16(b) is modest, with the only reference provided by Representative Keller who stated:

> If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. * * * The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act.

Brooklyn Sav. Bank, 324 U.S. at 706 citing 83 Cong. Rec. p. 9264.

language into statutes. *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (holding a statutory construction to be improper that "would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous.") If the NLRA provided a right to pursue collective relief when Congress passed it in 1935, Congress would not have needed to enact § 16(b) of the FLSA three years later. *See id.* (explaining that the rule against superfluous constriction "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times."). And, it wouldn't have been free to curtail that right in 1947. *See id.* Indeed, restriction of those supposed collective rights under the Portal-to-Portal Act of 1947 most certainly would have brought the amended version of the FLSA into conflict with the NLRA. But it did not.[13]

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[13] Congress eventually made it clear that the substantive rights contained in the FLSA – such as the right to minimum wage – do not include the right to representative actions. In 1947, Congress amended § 16(b) in the Portal-to-Portal Act Amendments to the FLSA. § 5, 61 Stat. 84, 87-88 (1947). These amendments added the opt-in requirement and repealed a provision in section 16(b) "permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated." H.R. Conf. Rep. No. 80-326, at 13 (1947). These changes had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche*, 493 U.S. at 173. Moreover, Senator Donnell, then Chairman of the Senate Judiciary Committee, articulated the rationale for the provision: "[I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary

Properly analyzed in the context of the FLSA, rather than the NLRA, class and collective action waivers are unquestionably valid, and outside the scope of the FAA's savings clause, regardless of the asserted contractual defense.

B. Claimed Illegality is not an Exception Under the FAA's Savings Clause.

The FAA's savings clause, which the Seventh and Ninth Circuits and the Board rely on to avoid FAA enforcement, is inapplicable here for a more fundamental reason.[14] Claimed illegality is not a defense subject to savings clause application.

The savings clause contained in Section 2 of the FAA is restricted in application by its own language:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter

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person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit." *See Arrington v. Nat'l Broad. Co., Inc.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 Cong. Rec. 2182 (1947)).

[14] In *Epic Systems* and *Morris*, the Seventh and Ninth Circuits did not acknowledge that collective litigation, under either Rule 23 or the FLSA, is a waivable, procedural right, regardless of the presence of the NLRA. Instead, those courts followed the Board's lead and concluded that under the NLRA, an arbitration agreement waiving class litigation rights is illegal, and that supposed illegality renders the agreement unenforceable under FAA's savings clause.

> arising out of such contract . . . shall be *valid*, *irrevocable*, and *enforceable*, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

(FAA § 2, 9 U.S.C. § 2) (emphasis added). That is, the savings clause, which begins with the word "save," provides an exception to enforcement of arbitration agreements only upon grounds that apply to *revocation*. Congress deliberately chose not to include defenses based on validity or enforceability within the clause. The meaning of "revocation" in Section 2 must further be squared with Section 4 of the FAA, limiting the means of denying arbitration:

> The court shall hear the parties, and upon being satisfied that the *making of the agreement for arbitration* or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). In harmony with Section 4, "revocation" refers to an appropriate revocation of the contract based on a legal flaw in the formation of the agreement. That is the sole means under Section 4 by which a court can deny a motion to compel arbitration and resolve a dispute otherwise subject to an arbitration agreement.

The savings clause was designed to apply only where contract formation was in question. Before the FAA, parties could strategically revoke their agreement to arbitrate without regard to contract law

constraints. Arbitration clauses existed, "but they [were] used with undue caution and a great degree of uncertainty because of the revocability of the arbitration agreements after trouble has arisen and after arbitration has commenced." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. on the Judiciary. 67th Cong. 3-4 (1923) (Statement of Charles L. Bernheimer). The hearings leading up to the passage of the FAA reflect this concern:

> "The difficulty is that men do enter into such agreements and then afterwards repudiate the agreement, and the difficulty has been that for over 300 years, for reasons which it would take me too long to undertake to explain at this time, the courts have said that that kind of agreement was one that was revocable at any time."

Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary. 68th Cong., 14 (1924) (Statement of Julius Henry Cohen).

Sections 2 and 4 of the FAA filled that gap by providing the relief that the business community sought for arbitration agreements – equal footing with other contracts. Prior to final passage, Congress explained that parties could seek refuge under the savings clause by asserting that "no arbitration agreement was ever made." H.R. Rep. 96 at 2, 68th

Cong. 1st Session, Jan. 24, 1924.[15] Absent such a formation-based defense, however, Section 4 required a court to compel arbitration via "very simple" motion practice. *Id.*

In Section 2, Congress deliberately chose to subordinate public policy-based contract defenses, which bear on enforceability, in favor of FAA-backed enforcement to rid the "anachronism of our American law" that until then permitted free-wheeling repudiation of arbitration agreements. H.R. Rep. 96 at 1. Therefore, "Contract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause." *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring).

As a result, a court may set aside an arbitration agreement if – and only if – "a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring); *see also Hudson v. Citibank (S. Dakota) NA*, No. S-14740, 2016 WL 7321567, at *4 (Alaska Dec. 16, 2016) (refusing to

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[15] The stated reasoning behind the savings clause dovetails with testimony presented to Congress in 1924 during deliberations. *See, e.g.*, Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary. 68th Cong., 14 (1924) (Brief submitted regarding The Proposed Federal Arbitration Statute, at 35) ("At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.")

apply a waiver defense to invalidate an arbitration agreement because "'the conspicuous omission of "invalidation" and "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.'") (quoting *Concepcion*, 563 U.S. at 354, Thomas, J., concurring). Otherwise, under Section 4, a court must issue an order compelling arbitration, at which point a party is free to raise other defenses to the contract as a whole. *Halcon Int'l, Inc. v. Monsanto Australia, Ltd.*, 446 F.2d at 156, 159 (7th Cir. 1971); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.'").

The Seventh and Ninth Circuits sidestepped the distinction between a revocation-based defense and a public-policy-type defense by asserting that illegality is a general defense that is tied to contract formation. *Epic Systems*, 823 F.3d at 1157 ("Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement"); *Morris*, 834 F.3d at 985 ("The FAA recognizes a general contract defense of illegality").

On the contrary, however, this Court has been quite clear that "[t]he whole doctrine of avoiding contracts for illegality and immorality is founded on public policy" – not contract formation. *See Hanauer v.*

Doane, 79 U.S. 342, 349 (1870); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("illegal promises will not be enforced in cases controlled by the federal law"); *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899) ("The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest.").

Thus, illegality is not a defense related to the making or formation of a contract. Rather, those defenses include "fraud, duress, or unconscionability," which under Section 2 may be used to avoid enforcement through revocation. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

Even if illegality were a defense in the Consolidated Cases, it is not the type of defense that the FAA permits to revoke the arbitration agreement. As a public-policy-based defense, illegality does not fall within the contract formation realm required for savings clause application under Section 2. Therefore, the savings clause is inapplicable under these circumstances, and absent a contrary congressional command specifically excepting the NLRA from the FAA's reach, the FAA's pro-enforcement policy prevails. *See CompuCredit*, 565 U.S. at 98.

C. The *ejusdem generis* canon confirms that Section 7 does not refer to collective or class litigation.

Applying the *ejusdem generis* canon, "other concerted activities" must be interpreted in context and is limited to activities like the unionizing and collective bargaining referenced in the statute. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1086-87 (2015) (holding general phrase "tangible object" was limited to "things used to record or preserve information" where it was part of statutory phrase referring to anyone who "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object"); *Sossamon v. Texas*, 563 U.S. 277, 292 (2011) (limiting residual phrase "or the provisions of any other Federal statute prohibiting discrimination" to federal statutes explicitly referencing discrimination where phrase followed citation to four other federal statutes explicitly prohibiting discrimination); *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61-63 (2004) (holding "failure to act" was limited to failure to take discrete agency action where it followed reference to "agency rule, order, license, sanction, relief"). This phrase could include, for example, picketing, distributing literature, or collecting signatures on petitions aimed at influencing an employer's activities.

The Seventh and Ninth Circuits ignored this well-established canon in reading "other concerted activities" to create a right to file class and collective lawsuits. Instead of examining the language in context, the Seventh Circuit referred to dictionary definitions

of "concerted activities," opined that a broad reading of the phrase was consistent with "[t]he NLRA's history and purpose," and then followed the NLRB's post-2010 interpretation of the phrase. *Epic Systems*, 823 F.3d at 1153. The Ninth Circuit relied almost exclusively on deference to the NLRB as its justification for holding that "concerted activities" includes lawsuits. *Morris*, 834 F.3d at 980-84.

Both Circuits' approaches violate the basic rule that the starting point of any statutory construction is examining the language of the statute itself. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). *See also Yates*, 135 S. Ct. at 1080-82 (whether language is ambiguous "does not turn solely on dictionary definitions," but rather requires examination of "the specific context in which that language is used, and the broader context of the statute as a whole" (internal quotation marks omitted)). Because the general phrase "other concerted activities" follows more specific references to unionizing and collective bargaining, the analysis ends with the statute's words. There is no basis to interpret "other concerted activity" to include participating in class or collective lawsuits where other more specific terms clearly refer to unionizing and collective bargaining.

III. The Board is not Entitled to Deference in Construing the NLRA in Conjunction with the FAA.

Normally this Court might defer to the Board's reasonable interpretation of ambiguous NLRA provisions. *See Chevron*, 467 U.S. 837; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967 (2005). But it would be inappropriate to defer to the Board's construction of the NLRA in this instance because there is no ambiguity and, to do so allows the NLRB, not Congress, to decide that its statutory powers trump the FLSA and the FAA. *Chevron* deference should not be expanded to give a federal agency the power to ignore Congress and to decide what the law should be.

First and foremost, there is no ambiguity requiring deference here. The judiciary is more than capable of reading the plain language of NLRA Section 7 and FAA Section 2 – neither of which support the Board's position that Section 7 prevents employers from defending against a class or collective action by relying on an FAA-enforceable arbitration agreement. *See, e.g.*, *Lechmere*, 502 U.S. at 539 (denying Board deference regarding the scope of Section 7 rights because it "rest[s] on erroneous legal foundations"). This is "a pure question of statutory construction," in which this Court's "first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987).

Second, the presence of the FAA as potentially controlling forecloses any deference to the Board. *Chevron* deference does not apply when two statutes must be construed and the agency has policy-making authority over only one of them.[16] In similar circumstances, such as when the Board sought deference for interpreting the Bankruptcy Code, this Court has rejected such deference. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress's intent in passing the Bankruptcy Code.").

Plainly, however, even where applicable the Board's "discretion has limits." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Those limits are reflected by the legal balance that must be struck when the Board pursues NLRA policy goals that intrude upon the territory of other federal statutes. As this

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[16] Congress, of course, has not delegated interpretative authority to the Board regarding the FAA, or an ambiguity reflected by the FAA. As "[a]gencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, J. dissenting) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). "An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner." *Id.* at 1883. There is, thus, no support for extending any deference to the Board's interpretation of the FAA's savings clause or any other FAA provision.

Court has posited: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47 (Board was entitled to no deference in its conclusion that employees did not violate federal mutiny statute, thereby entitling them to back pay). Since *Southern S.S. Co.*, this Court has never deferred to the Board when its interpretations of the NLRA "potentially trench upon federal statutes and policies unrelated to the NLRA":

> Thus, we have precluded the Board from enforcing orders found in conflict with the Bankruptcy Code, *see Bildisco*, []at 527-534, 529, n.9, 104 S. Ct. 1188 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"), rejected claims that federal antitrust policy should defer to the NLRA, *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 [] (1975), and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act, *Carpenters v. NLRB*, 357 U.S. 93, 108-110 [] (1958).

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002).

Beginning in *D.R. Horton*, the Board ventured well beyond interpreting the scope of Section 7 rights under the NLRA. It further interpreted Section 2 of the FAA,

and concluded that the savings clause within Section 2 invalidated an arbitration agreement that – in the Board's opinion – violated public policy by depriving employees of Section 7 rights to bring collective legal claims. *See In Re D.R. Horton, Inc.*, 357 NLRB 2277, 2287 (2012) (expounding upon Section 2 and savings clause policy and concluding that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable").[17]

Third, the Board's position in the Consolidated Cases reflects shifting Board policy concerns that should not affect this Court's statutory construction analysis. Indeed, just seven years ago, the Board took a different approach.[18] NLRB Gen. Counsel Mem. 10-06. But the issue is what Congress meant when the NLRA was passed in 1935, not what the emergent policy was in 2010 or 2012 when *D.R. Horton* was decided.

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[17] Both the Seventh and Ninth Circuits applied *Chevron* deference to the Board, even though the Board has no policy-making position with regard to the FAA and even though its interpretation of the NLRA had recently changed. The Eighth Circuit, by contrast, in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013) rejected *Chevron* deference because "the Board has no special competence or experience in interpreting the Federal Arbitration Act." *Id.* (quoting *Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784, 787 (E.D. Ark. 2012).

[18] An administrative agency's reasoning may be entitled to *Chevron* deference even following a change in position. However a change in position that reflects "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Brand X*, 545 U.S. at 981).

See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 228 (1994) (the "most relevant time for determining a statutory term's meaning" is when the statute was passed).

It is the province of the judiciary – not the executive – "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In fact, "the question whether Congress has or hasn't vested a private legal right in an individual 'is, in its nature, judicial, and must be tried by the judicial authority.'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Permitting *Chevron* deference to control the result here would be tantamount to transferring the independence of the federal judiciary (together with Congress' law-making authority) to an administrative agency acting as legislator, executive, and judge.[19] That is not the appropriate context for *Chevron* deference.

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[19] Indeed, as stated in The Federalist No. 78 (Alexander Hamilton): "the interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the [l]egislative body."

CONCLUSION

Congress did not provide a right to bring collective or class legal claims within the NLRA in 1935. Nothing the Board says now can change that. Congress did, however, in 1938 establish a procedural right to collective actions within the FLSA because such rights did not previously exist. That fact alone should be enough to answer the question that NLRA Section 7 contains no guaranteed right to pursue collective claims. Moreover, the savings clause of the FAA applies only to except enforcement of arbitration agreements where a dispute concerns contract formation. So a public-policy-driven defense of illegality, on the grounds that an arbitration agreement requiring individual arbitration is illegal under the NLRA, cannot stop FAA-mandated enforcement.

Arbitration agreements, like those in the Consolidated Cases, requiring individual arbitration, benefit both employees and employers, particularly in the staffing and restaurant industry. The agreements streamline resolution methods that enhance employee recovery to the full extent permitted by law and provide employers protection from the *in terrorem* effect of class litigation that rewards attorneys (on both sides) but does little in the way of job creation. This Court has never construed another statute, such as the NLRA, to invalidate these agreements when they provide for full effective vindication of individual rights. Now is not the time to change the meaning of what Congress said. The decisions of the Seventh and Ninth

Circuits should be reversed and of the Fifth Circuit affirmed.

Respectfully submitted,

JOHN B. LEWIS
Counsel of Record
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
Key Tower, Suite 2000
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

GARRETT R. FERENCZ
TIMOTHY O'DONNELL
1015 A Street
Tacoma, Washington 98402
Counsel for Amicus Curiae TrueBlue, Inc.

MELISSA A. SIEBERT
BONNIE K. DELGOBBO
BAKER & HOSTETLER, LLP
191 North Wacker Drive, Suite 3100
Chicago, Illinois 60606

STEPHEN C. DWYER
277 S. Washington Street, Suite 200
Alexandria, Virginia 22314
Counsel for Amicus Curiae American Staffing Association

ANGELO I. AMADOR
2055 L Street, N.W.
Washington, D.C. 20036
Counsel for Amicus Curiae Restaurant Law Center

JASON B. KLIMPL
370 Lexington Avenue, Suite 902
New York, New York 10017
Counsel for Amicus Curiae New York Staffing Association

KEVIN W. SHAUGHNESSY
JOYCE ACKERBAUM COX
BAKER & HOSTETLER, LLP
Sun Trust Center, Suite 2300
200 South Orange Avenue
Orlando, Florida 32801

KATHRYN S. BERNARD
435 Elm Street, Suite 300
Cincinnati, Ohio 45202
Counsel for Amicus Curiae Staffmark

JENNIFER HANKES PAINTER
26745 Malibu Hills Road
Calabasas, California 91301
Counsel for Amicus Curiae On Assignment, Inc.

CRAIG S. HOPEWELL
11591 Goldcoast Drive
Cincinnati, Ohio 45249
Counsel for Amicus Curiae BelFlex Staffing Network, LLC

Counsel for Amici Curiae

RECORD AND BRIEFS

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND ERNST AND YOUNG U.S.,LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *ET. AL.*,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth, Seventh and Ninth Circuits

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENT IN NO. 16-307

MARTIN S. KAUFMAN
Counsel of Record
ATLANTIC LEGAL FOUNDATION
500 MAMARONECK AVENUE, #320
HARRISON, NEW YORK 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for *Amicus Curiae*
Atlantic Legal Foundation

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business

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[1]All parties have consented to the filing of this brief and the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

and commerce and in alleviating the burdens on courts and parties.

The interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in other cases before this Court involving enforceability of contractual arbitration provisions, including *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Amicus believes that the decisions of the Courts of Appeals for the Seventh and Ninth Circuits in this case, holding that waivers of the right to demand class arbitration violate section 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA) and are unenforceable, are inconsistent with the purposes of the Federal Arbitration Act (FAA) and both the long-standing and recent teaching of this Court regarding arbitration. Those decisions, if allowed to stand, will deter many employers from incorporating arbitration as a dispute resolution mechanism in their dealings with employees, thus frustrating a fundamental purpose of the FAA.

Amicus also believes that the decision of the Court of Appeals for the Fifth Circuit is correct and that the rulings of the National Labor Relations Board flout directly applicable decisions of this Court and are entitled to no deference.

PRELIMINARY STATEMENT

Employers and employees often enter into employment contracts providing for the arbitration of all disputes arising from the employment relationship. Those arbitration provisions in those contracts often require that claims be resolved on an individual basis and include class waivers.

This Court has recognized that there are "real benefits" to arbitration generally and in "the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-23 (2001). "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation." *Id.* at 123.[2]

Arbitration is also frequently more expeditious than full-blown litigation. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). Class or collective proceedings would "make the process slower, more costly, and more likely to generate procedural morass than final judgment," thus negating the "principal" benefits of arbitration. *AT&T Mobility LLC* v. *Concepcion*,

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[2] This Court has also recognized that Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to overcome the "old common-law hostility toward arbitration," *Southland Corp.* v. *Keating*, 465 U.S. 1, 14 (1984) and the long history of "judicial hostility" to arbitration. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

563 U.S. 333, 348 (2011). Employers and employees often agree to class waivers to preserve the "fundamental attributes of arbitration." *Id.* at 344.

The question in these consolidated cases is whether those class waivers are enforceable. Amicus submits that the answer is "yes."

Section 2 of the Federal Arbitration Act (FAA) states that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Recognizing the benefits of arbitration (see *Concepcion*, 563 U.S. 333, 344, 345 (2011)), the FAA establishes a presumption in favor of enforcing arbitration agreements as written that can be overcome by another statute only if that statute is a "congressional command" that is contrary to the FAA's mandate.

This Court has consistently recognized that the FAA reflects "a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339-40 (internal quotation marks and citation omitted); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). "[C]ourts must rigorously enforce arbitration agreements according to their terms."

Amer. Express Co. v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Concepcion*, 563 U.S. at 339. The obligation to "rigorously enforce" arbitration agreements includes terms requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g., Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352 (2011).

Employment agreements are no exception to that general rule, *see Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001), nor are arbitration agreements that require individual arbitration, *see Concepcion*, 563 U.S. at 345-352. The general rule applies as well to agreements to arbitrate federal statutory claims, unless "the [FAA's] mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citations omitted).

Section 7 of the NLRA, 29 U.S.C. § 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a) of the NLRA makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. § 158(a). The NLRA does not contain any reference to class or other collective dispute-resolution procedures, either through arbitration or in litigation.

The cases now before the Court present an important question: Whether an arbitration provision in an employment agreement that requires an employee to arbitrate claims on an individual basis is valid and enforceable under the FAA or whether the NLRA overrides the FAA. *Amicus* submits that the FAA mandates enforcement of the arbitration provisions at issue.

The Decisions Below

Seventh Circuit - *Epic Systems*, No. 16-285

The Seventh Circuit Court of Appeals concluded that "[a] collective, representative, or class legal proceeding is * * * a 'concerted activit[y]'" under NLRA Section 7. Pet.App. 10a (brackets in original), and Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1). Thus, the court held, the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

The Seventh Circuit began its analysis by adopting the NLRB's reasoning – promulgated in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) – that engaging in class, collective or representative proceedings is "concerted activity" and a protected right under Section 7 of the NLRA, and thus it

would be an unfair labor practice under Section 8 of the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise" of this right. According to the Seventh Circuit, the NLRA's legislative history and purpose indicated that "concerted activity" unambiguously includes representative, class, joint and collective actions. Further, even if the court were to find the term "concerted activity" ambiguous, it would then have to defer to the NLRB's interpretation of that term and find the class action waiver to be unlawful.

Epic argued that because class actions under Rule 23 of the Federal Rules of Civil Procedure did not exist when Congress enacted the NLRA in 1935, Congress could not have intended Rule 23 class actions to be "concerted activity" under the NLRA. The court, however, held that "concerted activity" is not limited to what was "concerted activity" in 1935. Also, the arbitration agreement not only waived Rule 23 class actions, it waived all forms of representative, collective or joint proceedings, and these types of proceedings, including collective actions under §216(b) of the FLSA, existed prior to 1935.

The Seventh Circuit rejected the argument, accepted by all the other circuits that had theretofore ruled on the matter, that the arbitration agreement must be enforced under the Federal Arbitration Act (FAA). The court even went so far as to say that "it is not clear to us that the FAA has anything to do with this case." 823 F.3d at 1156. Nevertheless, the court proceeded to

examine whether there was a conflict between the FAA's mandate to place arbitration agreements on the same footing as any other contract and the NLRA. In doing so, the court addressed the FAA's "savings clause," contained in 9 U.S.C. § 2, which provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (citing 9 U.S.C. § 2) and "[i]llegality is one of those grounds." 823 F.3d at 1157. The court found that the savings clause provided a way to harmonize the NLRA and FAA, by finding the agreement's class waiver to be unenforceable. According to the Seventh Circuit panel, the agreement to resolve employment disputes by individual arbitration is illegal under the NLRA, and because an illegal agreement is not enforceable under the FAA's savings clause, there is no conflict between the FAA and NLRA. *Id.*

Finally, the Seventh Circuit rejected Epic's argument that even if Section 7 protects a right to class or collective actions, the right is merely procedural, not substantive, and the FAA requires enforcement of the agreement since it does not involve the forfeiture of a substantive right. The panel rejected this argument because it found the right to engage in "concerted activity" through class or collective actions to be a "substantive" right under the NLRA, even though the class action device itself is procedural; since the arbitration agreement required employees to relinquish a right that the NLRB has declared to

be substantive, the arbitration agreement was not enforceable under the FAA.

The Seventh Circuit acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) had come "to the opposite conclusion," 823 F.3d at 1157, and that it was "creat[ing] a conflict in the circuits." *Id.* at n.†.

Ninth Circuit - *Ernst & Young*, No. 16-300

The Ninth Circuit Court of Appeals panel majority began by analyzing the NLRA and concluded that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums," *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 981 (2016) (internal quotation marks and citation omitted) and establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at 983.

The arbitration provision in the Ernst & Young employment agreement, the majority held, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 983. The arbitration provision thus interferes with "a protected § 7 right in violation of § 8" and "[t]hus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." *Id.* at 984.

The FAA "does not dictate a contrary result," the majority reasoned, because "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum," *id.* at 985, and "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*," *Id.* at 989 (emphasis in original).

The Ninth Circuit majority concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable, under the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," (citing 9 U.S.C. § 2.) *Id.* at 989.

Circuit Judge Ikuta dissented. 834 F.3d 990-998. She cogently wrote that "This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent, *id.* at 990. "Contrary to the majority's focus on whether the NLRA confers 'substantive rights,'" she wrote, "in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA," *id.* at 992, and that the NLRA contained nothing "remotely close" to a "contrary congressional command" that mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Id.* at 995.

Judge Ikuta also rejected the majority's reliance on the FAA's saving clause. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in her view, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 997. Judge Ikuta further reasoned that, even if the NLRA could be interpreted as giving employees a substantive, nonwaivable right to classwide actions, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.* (quoting *Concepcion*, 563 U.S. 333, 344 (2011)), The majority's reasoning that section 7 of the NLRA complies with the FAA simply because it "applies equally to arbitration and litigation." was "expressly rejected" by Concepcion. *Id.* at 338.

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA," and the majority "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." *Id.* at 998.

The Ninth Circuit majority recognized that its ruling is at odds with decisions of three other courts of appeals – including a decision of the Second Circuit involving the same defendants (petitioners here) – which held that the identical arbitration provision at issue here is enforceable.

See Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013).[3]

Fifth Circuit - *NLRB v. Murphy Oil*, No. 16-307

In *Murphy Oil USA, Inc.* v. *N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), the Fifth Circuit addressed the legality of individual arbitration agreements under Sections 7 and 8(a) of the NLRA and, as it had in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), once again upheld the legality of an arbitration agreement that contained a waiver of the right to commence or participate in class-wide arbitration or litigation.

Murphy Oil's arbitration agreement provided that employees must individually "resolve any and all disputes or claims...which relate...to Individual's employment...by binding arbitration." Several employees filed a FLSA collective action and Murphy Oil moved to dismiss the suit and to

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[3] The Second Circuit, in *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam), held that a class waiver in an arbitration clause in the employment context is enforceable, in a case involving the very same agreement as is at issue in No. 16-300. The *Sutherland* court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-97 & n.8. The Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* It held that an employment arbitration agreement is enforceable under the FAA. *Id.* at 292-93, 299 (citing *Amer. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

compel arbitration. One of the plaintiff employees filed an unfair labor charge with the NLRB alleging that the agreement unlawfully interfered with employees' Section 7 rights guaranteed by the NLRA.

In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its *Murphy Oil* opinion, *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and instead reaffirmed its previous position that an arbitration agreement similar to Murphy Oil's violated the NLRA because the agreement restricted Section 7 rights to engage in concerted activity. The NLRB applied its *D.R. Horton* decision, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), to disallow Murphy Oil's arbitration agreement and concluded that both the original and amended Murphy Oil arbitration agreements could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges, and thus required corrective action.[4] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014).

Murphy Oil petitioned the Fifth Circuit to review the NLRB decision that ignored the Court's *D.R. Horton* ruling. The court considered Murphy

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[4] After the Fifth Circuit's *D.R. Horton* decision, Murphy Oil revised its agreement to include language clarifying that the agreement did not bar employees from "participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

Oil's pre- and post-*D.R. Horton* agreements separately because the agreements had different language. The Fifth Circuit concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for "any and all disputes or claims...which relate...to Individual's employment" could have a chilling effect on employees' ability to act collectively, and thus constituted an unfair labor practice, because it could be interpreted to mean that the employee could not file unfair labor practice charges with the NLRB.

The Fifth Circuit found that Murphy Oil's revised arbitration agreement did not violate the NLRA because an employee could not reasonably interpret the revised agreement as prohibiting the filing of unfair labor practice charges. The court held that Murphy Oil had not committed an unfair labor practice by enforcing its arbitration agreement. 808 F.3d at 1019.

The *Murphy Oil* decision is grounded in the principle that individual arbitration agreements are not per se unfair labor practices. *Id.*

SUMMARY OF ARGUMENT

This case concerns a purported conflict between section 2 of the FAA, which requires that arbitration agreements be enforced according to their terms, and section 7 of the NLRA, which the employee Respondents and the NLRB contend prohibits provisions such as the one contained in

the agreements between the employers and employees at issue here which stipulate that all employment disputes be resolved through individual arbitration.

Section 2 of the FAA provides in clear language that arbitration agreements must be enforced according to their terms. The employees and the NLRB, as the parties seeking to avoid arbitration pursuant to the terms of their agreements have the burden of showing that the NLRA contains a clear command that is contrary to the FAA's mandate to enforce arbitration agreements according to their terms.

The Court has a long and clear body of precedent that teaches that the FAA's command to enforce arbitration agreements according to their terms will be overridden only by a clear contrary congressional command in another federal statute. The burden of proving that a federal statute displaces the FAA is on the party seeking to avoid arbitration. That burden has not been met in any case in which the statute in question does not expressly prohibit arbitration, and this Court has rejected litigants' attempts to avoid arbitration by asserting that another federal statute displaces the FAA.

In this case, the employee Respondents and the NLRB cannot show that Congress intended the NLRA to override the FAA so as to preclude enforcement of arbitration agreements in general or agreements to arbitrate on an individual basis in particular. Section 7 of the NLRA, upon which

the employees and the NLRB rely, contains no language about arbitration, litigation, or any dispute-resolution mechanism; it does not mandate the availability of a judicial forum or collective dispute-resolution procedures in employment disputes. Their reliance on Section 7's "residual clause" fails because its language falls short of the specific language in other statutes that this Court has held to be insufficient to constitute a congressional "command" that overrides the FAA.

The legislative history of the NLRA does not indicate a congressional intent to preclude agreements to arbitrate on an individual basis or agreements to arbitrate generally.

The underlying purposes of the NLRA are not inconsistent with agreements to arbitrate employment-related disputes individually. The principal purpose of the NLRA is to minimize industrial strife by encouraging self-organization and collective bargaining. Read in that light, the residual clause of section 7 of the NLRA has nothing to do with arbitration or litigation.

The saving clause of section 2 of the FAA permits courts to deny enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." The clause applies where a generally applicable doctrine prohibits the enforcement of a contract – in this instance, an arbitration agreement. The saving clause preserves generally applicable contract defenses such as fraud or lack of capacity or lack of consideration, but does not

"save" defenses that discriminate against or apply only to arbitration.

The Seventh and Ninth Circuits invoked the generally applicable "illegality" defense recognized in most States. Those courts reasoned that the NLRA confers a nonwaivable substantive right to invoke collective-litigation procedures, making it "illegal" to enforce a contract that waives that right, triggering the saving clause. But in these cases, the courts of appeal conflated common law "illegality" defenses (which the FAA was largely enacted to overcome as they pertained to arbitration agreements, see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983)) with the "clear conflicting command" concept. The decisions of the Seventh and Ninth Circuits are incorrect. They ignore this Court's teaching that the overriding purpose of the FAA is to advance "a liberal federal policy favoring arbitration agreements" and that arbitration agreements must be enforced according to their terms, *Concepcion*, 563 U.S. at 339, that the foregoing principle applies even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command which must be expressed with "clarity." *CompuCredit*, 565 U.S. at 98.

ARGUMENT

I. EMPLOYMENT AGREEMENTS REQUIRING INDIVIDUAL ARBITRATION ARE ENFORCEABLE ABSENT A CONTRARY CONGRESSIONAL COMMAND

Section 2 of the FAA provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This Court has repeatedly held that the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 22-23; *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Consistent with that policy, the Court has repeatedly held that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") and has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 565 U.S. 95 (2012); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen*, 559 U.S. 662.

The obligation to "rigorously enforce" arbitration agreements includes terms requiring

the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g.*, *Italian Colors*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352 (2011).[5] The foregoing principle applies "even when the claims at issue are created by federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 565 U.S. at 98 (citation and internal quotation marks omitted).

The advantages of arbitration include the use of "efficient, streamlined procedures" that "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 563 U.S. 333, 344, 345 (2011).[6] The advantages of the arbitration process do not "somehow disappear when transferred to the employment context." *Circuit City Stores*, 532 U.S. 105, 123 (2001). If anything, those advantages

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[5] This follows from "the fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

[6] There are other advantages to arbitration, not cited in this Court's decisions. Among them are: arbitration may result in more accurate outcomes because of arbitrator expertise; arbitration may enhance the ability of parties to have their disputes resolved using rules of particular trades or industries; and arbitration may better protect confidential information from disclosure. See C. R. Drahozal & S. J. *Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. on Disp. Resol. 433, 451-52 (2010). In addition, arbitration has a societal benefit because it alleviates burdens on the judicial system.

may be "of particular importance" in the context of employment litigation, which "often involves smaller sums of money than disputes concerning commercial contracts," *Id.*

a. The NLRA Does Not Conflict With The FAA

The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congress's intent to supersede the FAA must be expressed with "clarity," *CompuCredit*, 565 U.S. at 103, and "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also CompuCredit*, 565 U.S. at 109.

The Court's discussion of the specificity required of the "conflicting" statute to come within the exception of FAA section 2 in *CompuCredit* is instructive. As the Court in that case concluded, absent such a clear expression of Congressional intent to exclude certain types of disputes from the ambit of private dispute resolution encouraged and sanctioned by the FAA, courts must give effect to the FAA's mandate to enforce arbitration provisions according to their terms. *See*, *CompuCredit*, 565 U.S. at 104.

Section 7 of the NLRA is silent as to the issues in these cases – arbitration, individual arbitration, class arbitration – or, more broadly, class action lawsuits, litigation generally, or any other mode of dispute resolution.

Section 7 of the NLRA provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. That section does not by its terms proscribe arbitration and it contains no language guaranteeing the recourse to a court to resolve disputes between employers and employees. It contains no reference to class or other collective dispute-resolution procedures.

In cases where the statute alleged to conflict with the FAA and thus trigger the "conflicts" clause does not explicitly prohibit arbitration, the Court has rejected attempts to invoke the other federal statute to supersede the FAA. Numerous important remedial federal legislative regimes have been found not to conflict with and override the FAA's mandate to enforce arbitration agreements. *See, e.g.*, the Sherman Act, in *Italian Colors*, 133 S. Ct. at 2309-12 and in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-39 (1985); the Credit Repair Organizations Act, in *CompuCredit*, 565 U.S. at 99-105; the Truth in Lending Act in *Green Tree Financial Corp.* v. *Randolph*, 531 U.S. 79, 90-92 (2000); the Securities Exchange Act of 1934 in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-21

(1974), and, most relevant here because it arose in the context of an employment relationship, the Age Discrimination in Employment Act in *Gilmer*, 500 U.S. at 26-33.

Respondents and the NLRB relied below on the clause at the end of section 7 which gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The language of that residual clause does not come close to demonstrating a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100. Indeed, the most natural reading of that clause is that it pertains to the items which follow it and which concern collective bargaining and union organizing. These are also the overarching purposes of, and background for, the enactment of the NLRA as a whole, so this natural reading is consistent with the purposes of the NLRA.[7]

Even if the right to "engage in other concerted activities" could be construed as creating a right for employees to pursue employment claims collectively, that would not amount to a clear congressional command to override the FAA. The

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[7] The purpose of the NLRA was to minimize industrial strife by "encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151; *see also* 29 U.S.C. § 157.

Court has addressed this question in analogous cases. In *Italian Colors*, 133 S. Ct. at 2311, the Court observed that in *Gilmer*, the Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." In *CompuCredit*, this Court held that although the alleged conflicting statute, the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, contains an express right to file suit in federal court, that language did not "establish the contrary congressional command overriding the [FAA]." 565 U.S. at 100-101 (internal quotation marks and citation omitted). The language of section 7 of the NLRA is much less specific than the "guarantees" of the right to sue in court at issue in *CompuCredit* and the express right of employees to take collective action at issue in *Gilmer*.[8]

The legislative history of the NLRA provides no evidence of a congressional intent to preclude agreements to arbitrate on an individual basis or to arbitrate more generally. There was no "discuss[ion] [of] the right to file class or

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[8] The Court in *CompuCredit* remarked that if Congress had intended to bar arbitration of consumers' claims, "it would have done so in a manner less obtuse than what respondents suggest," and it gave examples of congressional commands that would be sufficiently clear. *CompuCredit*, 565 U.S. at 102. The same observation applies in these cases as well.

consolidated claims against employers" at all. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013).

Finally, there are no underlying purposes of the NLRA, discussed *supra*, n. 6, that are inconsistent or irreconcilable with individual arbitration.

In sum, nothing in section 7 of the NLRA, its legislative history, or purposes can be construed as a "clear command" by Congress to preclude arbitration, or individual arbitration, or other dispute resolution methods. And absent such a clear expression of intent, courts must give effect to the Arbitration Act's unambiguous mandate to enforce arbitration provisions according to their terms. *See, e.g.*, *CompuCredit*, 565 U.S. at 104.

b. The Saving Clause In Section 2 Of The FAA Does Not Preclude Contractual Obligations To Arbitrate Individually

The Seventh and Ninth Circuit Courts of Appeals held, and the NLRB argued to the Fifth Circuit, that the contractual waiver of the employees' rights to use collective-litigation procedures to resolve employment-related disputes was "illegal" under Sections 7 and 8 of the NLRA and therefore unenforceable under the saving clause. The saving clause permits courts to decline to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The "grounds * * * for the revocation of any contract" refers to "generally applicable doctrines of contract law," such as fraud, duress, or unconscionability, but not defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Concepcion*, 563 U.S. at 339.

The Seventh and Ninth Circuits attempted to misapply the saving clause in a manner reminiscent of the "great variety" of "devices and formulas" "declaring arbitration against public policy" that prompted the enactment of the Arbitration Act in the first place. *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

Respondent's and the NLRB's contention that the FAA's saving clause obviates the obligation to resolve employment disputes in individual arbitration is inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause.[9] *Concepcion*, 563

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[9] The "saving clause" argument made below by respondents and accepted by the Seventh and Ninth Circuits is of a kind with the "devices and formulas" "declaring arbitration against public policy" that motivated Congress to enact the FAA in the first place. *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

(continued...)

U.S. at 341. This Court there determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion* at 344.

That the contractual language that bars "collective" remedies for employment disputes also applies to litigation as well as arbitration does not make it less inimical to arbitration, nor does it make it a "generally applicable" defense. Section 7 of the NLRA is not a ground for the revocation of "*any* contract," because only one type of contract – employment contracts – is subject to the NLRA. *Id.* (emphasis added); *see Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984) and section 7 is being invoked to frustrate arbitration.

Finally, if the NLRA were construed to prohibit class waivers, it would "interfere[] with fundamental attributes of arbitration," *Concepcion*, 563 U.S. at 344, and the saving clause does not apply to any defense that disfavors arbitration's "defining features." *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017).

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[9](...continued)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed and the judgments of the Courts of Appeals for the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

Martin S. Kaufman
Counsel of Record
Atlantic Legal Foundation
500 Mamaroneck Avenue, #320,
Harrison, New York 10528
(914) 834-3322
mskaufman@atlanticlegal.org
Attorneys for Amicus Curiae
Atlantic Legal Foundation

June 16, 2017

RECORD AND BRIEFS

Nos. 16-285, 16-300 and 16-307

FILED
MAY 16 2017

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG LLP, *et al.*,

Petitioners,

v.

STEPHEN MORRIS, *et al.*,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH, NINTH AND FIFTH CIRCUITS

BRIEF OF BRISTOL FARMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN DOCKET NOS. 16-285 AND 16-300 AND IN SUPPORT OF THE RESPONDENTS IN DOCKET NO. 16-307

STEVEN B. KATZ
Counsel of Record
CONSTANGY BROOKS SMITH
& PROPHETE LLP
2029 Century Park East, Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

Counsel for Amicus Curiae

June 16, 2017

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Bristol Farms respectfully files this brief pursuant to Rule 37.3 in support of petitioners in *Epic Systems Corporation v. Jacob Lewis* (No. 16-285) and *Ernst & Young LLP, et al. v. Stephen Morris, et al.* (No. 16-300), and in support of respondents in *National Labor Relations Board v. Murphy Oil USA, Inc., et al.* (No. 16-307).[1]

Bristol Farms operates retail grocery stores throughout Southern California. Like many other California employers, it regularly enters into arbitration agreements with its employees to resolve any and all employment disputes which might arise. These arbitration agreements require Bristol Farms and its employees to resolve employment disputes on an individual basis. In July 2016, the National Labor Relations Board ("the Board") invalidated Bristol Farms' arbitration agreement because the Board found that it impermissibly required employees to pursue their employment-related claims on an individual, not class or collective, basis, and accordingly, was unenforceable under the National Labor Relations Act. *See Bristol Farms*, 364 N.L.R.B. No. 34 (2016).

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1. Pursuant to Rule 37.6, Bristol Farms affirms that no counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. A letter from the Solicitor General consenting to the filing of this brief, as well as letters reflecting the remaining petitioners and respondents' blanket consents to the filing of *amicus curiae* briefs, are on file with the Clerk.

Thereafter, Bristol Farms petitioned the D.C. Circuit to set aside the Board's Decision and Order, and that Petition for Review is now being held in abeyance pending this Court's decision in the instant matters. *See Bristol Farms v. NLRB*, Case No. 16-1247 (D.C. Cir.).

Bristol Farms submits this brief to raise an argument that the parties and courts below have not fully addressed and which may further assist this Court in evaluating the principal issue now before it. Further, because Bristol Farms' case before the D.C. Circuit presents the same issue as the issue to be resolved by the Court in these cases, Bristol Farms has a substantial interest in ensuring that the Court considers this additional argument before issuing its decision, as the decision may govern the outcome of Bristol Farms' matter in the D.C. Circuit.

SUMMARY OF ARGUMENT

Amicus concurs with the arguments advanced in the principal briefs of the employer parties (Petitioners Ernst & Young LLP and Epic Systems Corp., and Respondent Murphy Oil USA, Inc.) that this Court's task is to harmonize the Federal Arbitration Act and the National Labor Relations Act ("NLRA"), and that this task may be easily achieved by rejecting the construction of Section 7 of the NLRA that the National Labor Relation Board created in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *rev'd in relevant part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *Amicus* writes separately only to address a critical question that is not squarely addressed in the decisions under review or the principal briefs: whether a request for Rule 23(b)(3)-type class relief (in a pleading, motion, *etc.*)—as opposed to initiating litigation with or

without such a request—is in itself "concerted activity" under Section 7 of the NLRA.

Seeking certification of a Rule 23(b)(3)-type class action is not a form of "concerted activity" for a very simple reason: **the modern Rule 23(b)(3)-type class action is not a claim aggregation procedure. It is a form of virtual representation.** It is not a banding-together of persons with aligned interests; it is what amounts to the appointment of a *guardian ad litem* to litigate aligned interests. It simply does not fit into the rubric of the traditional understanding of "concerted activity," and when the Board in *D.R. Horton* stretched the meaning of "concerted activity" to accommodate seeking certification of a class, it adopted an interpretation that is beyond the ambit of the Board's expertise and the plain meaning of the NLRA.[2]

ARGUMENT

Section 7 of the NLRA affords employees "the right to . . . engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. Up until 1975, the Board applied a two-step analysis to Section 7. First, it "consider[ed] whether some kind of group action occurred." Second, if "group action" took place, then it

2. This Court will find little discussion of this issue in the decisions under review. The Fifth and Ninth Circuits do not discuss it at all. The Seventh Circuit in *Lewis*, briefly addresses the issue of whether seeking class certification is in itself concerted activity, but it proceeds under the unwarranted assumption that a Rule 23(b)(3)-type class action is group litigation, and does not address at all the question of whether *D.R. Horton* properly addressed Board precedent.

"consider[ed] whether that action was for the purpose of mutual aid or protection." *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 494 (1984) (discussing Board precedent before 1975) ("*Meyers I*"), *enforcement denied and remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) ("*Prill I*"). *See also, e.g., Root-Carlin, Inc.*, 92 N.L.R.B. 1313, 1314 (1951) ("Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self organization.").

In 1975, in *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999 (1975), the Board abandoned its traditional two-step analysis of Section 7 by holding that "group action" will be presumed if a single employee acts with the purpose of "mutual aid or protection" and no other employee objects. *See id.* at 1000 ("Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted."). "Under the *Alleluia* approach an observable manifestation of 'group will' *in the workplace* . . . was no longer required to find concert of action. . . . [I]t was the Board that determined the existence of an issue about which employees *ought* to have a group concern." *Meyers I*, 268 N.L.R.B. at 495 (emphasis in original). Over the ensuing years, *Alleluia*'s departure from Board precedent was roundly criticized in the Courts of Appeal. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980); *NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1082 (8th Cir. 1977).

Nine years later, in *Meyers I*, the Board overruled *Alleluia* and restored its longstanding approach to Section 7 issues. *Meyers I*, 268 N.L.R.B. at 498 ("[W]e hold that the concept of concerted activity first enunciated in *Alleluia* does not comport with the principles inherent in Section 7 of the Act."). In *Prill I*, the D.C. Circuit remanded *Meyers I* to the Board for reconsideration. The Board affirmed its rejection of *Alleluia*, and the D.C. Circuit affirmed. *Meyers Industries, Inc.*, 281 N.L.R.B. 882, 883 (1986) ("[W]e reaffirm our recognition that the Board has a wide latitude in interpreting Section 7 of the Act . . . . [W]ithin the conceivable limits of a general phrase such as 'concerted activities,' it is surely appropriate to choose that construction that is mostly responsive to the central purposes for which the Act was created. We believe that our choice in *Meyers I* . . . does fully reflect those purposes.") ("*Meyers II*"), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Industries, Inc. v. NLRB*, 487 U.S. 1205 (1988).

The modern Rule 23(b)(3)-type class action is the very antithesis of "concerted activity," as that term is understood in *Meyers I & II*, because it is not "engaged in with or on the authority of other employees." *See Meyers I*, 268 N.L.R.B. at 497 (*quoted with approval in Meyers II*, 281 N.L.R.B. at 885). "[I]t is incorrect to equate the class action device with more traditional forms of procedural aggregation. Instead, it is necessary to recognize the modern class action as a fundamentally new and different procedural animal—a wholly original model of litigation with its own unique procedural DNA." Martin H. Redish, *Rethinking The Theory Of The Class Action: The Risks And Rewards Of Capitalistic Socialism In The Litigation Process*, 64 Emory L.J. 451, 454 (2014).

The fundamental characteristic of this "wholly original model of litigation" is that it occurs without any pre-litigation agreement, communication or meeting-of-the-minds between members of the putative class. Indeed, Professor Harry Kalven, Jr. and Maurice Rosenfield, in their very influential article *The Contemporary Function Of The Class Suit*, 8 U. Chi. L. Rev. 684 (1940-41)—widely credited as one of the main inspirations for Rule 23[3]—could not have been clearer on this point:

> "What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it. There are basically two methods for doing this. The first is to organize the various claimants prior to suit and make them all parties plaintiff to the litigation; this is committee technique. *The second is to ignore the various claimants until a decree has been obtained and then to hold open the decree and to permit them upon*

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3. The Notes of the Advisory Committee on Rules to the 1966 amendments to Rule 23 cites Kalven & Rosenfield as a source of the Committee's criticisms of previous iterations of the Rule. *See also* Richard A. Nagareda, *Class Actions In The Administrative State: Kalven And Rosenfield Revisited*, 75 U. Chi. L. Rev. 603, 603 (2008) (Kalven and Rosenfield "offered the first major analysis of the class action device in institutional terms. The Article would occupy the field for more than a decade, until the emergence of a new generation of commentary spurred by the adoption in 1966 of Rule 23 of the Federal Rules of Civil Procedure in its modern form.").

> *solicitation under court auspices to participate in the benefits of the decree. The suit in form will be brought initially by any member of the group who, unchosen and unasked and without soliciting consents from the others or organizing them prior to trial, volunteers to assert the rights of all.* ***This is the technique of the class suit.***" *Id.* at 688 (emphasis added).

But while the Rule 23(b)(3)-type class action does not fit within the *Meyers I & II* rubric for "concerted activity," it fits *Alleluia*'s rubric like a glove. There can be little doubt over the proposition that a putative class action filed by a single employee to enforce statutory rights is for "mutual aid or protection" of other employees. Under *Alleluia*, but ***not*** *Meyers I & II*, "group action" is presumed, bringing the request for class status under the protections of Section 7.

For this reason, when the Board's General Counsel in 2010 addressed the question of whether seeking class status was concerted activity *per se*, he concluded that it must not be, because the opposite conclusion entailed a resurrection of the long-rejected *Alleluia* standard:

> "Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. ***To conclude otherwise would be a return to the concept of 'constructive concerted activity' that the Board rejected*** in *Meyers Industries* (*Meyers I*), 268 N.L.R.B. 493, 495-496 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985),

> reaffirmed, *Meyers Industries* (*Meyers II*), 281 N.L.R.B. 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions 'designed for the benefit of all employees' is concerted activity 'in the absence of any evidence that fellow employees disavow such representation')." NLRB, Gen'l Counsel Memorandum No. 10-06, at p. 6 (June 16, 2010) (emphasis added).

Accordingly, when the Board, in *D.R. Horton Inc.*, held that class relief waivers in arbitration agreements violated Section 7, it necessarily was departing from *Meyers I & II*, and at least partially resurrecting *Alleluia*. ***But the Board did not acknowledge that it was doing so, let alone justify swinging the precedential pendulum backwards.*** *D.R. Horton*'s entire discussion of the issues highlighted in the last six paragraphs is limited to this brief paragraph:

> "Depending on the applicable class or collective action procedures, of course, a collective claim or class action may be filed in the name of multiple employee-plaintiffs or a single employee-plaintiff, with other class members sometimes being required to opt in or having the right to opt out of the class later. *See, e.g.*, 29 U.S.C. § 216(b); Fed. R. Civ. P. 23(c)(2)(B)(v). To be protected by Section 7, activity must be concerted, or 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.' *Meyers*

> *Industries*, 281 N.L.R.B. 882, 885 (1986), *affd. sub nom. Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she 'seek[s] to initiate or to induce or to prepare for group action.' Meyers, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton Inc.*, 357 N.L.R.B. at 2279.

D.R. Horton's perfunctory analysis of the issue assumes that since members have the right to exclude themselves from a certified class, then "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action . . . ." This rule is indistinguishable from *Alleluia*'s rule that "where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted." *Alleluia*, 221 N.L.R.B. at 1000. By citing *Meyers II* for the rule of *Alleluia*, the Board engaged in a kind of administrative legerdemain. It left employers scratching their heads over what is the standard for concerted activity in the post-

D.R. Horton world. Is it *Meyers I & II*? *Alleluia*? Some mixture of the two? If the latter, how does the mixture work? Is it *Alleluia* for class relief waivers and *Meyers I & II* for everything? Is there a longer list of factual settings in which *Alleluia* should be applied? If so, how is that list defined? Does the Board get to choose one or the other depending on its views of the broader purposes of the Act? Or its views of sound labor policy? Or whim?

D.R. Horton does not represent sound administrative practice. It is a bedrock principle of administrative law that "[a]n agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent . . . ." *Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978). *Accord, e.g., National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) ("it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction."). The Board especially requires close supervision in this regard because it has sometimes followed a "process of ad hoc and inconsistent judgments in which the only determinative elements seems to be the composition of the NLRB panel which happens to hear the case . . . ." *Local 777*, 603 F.2d at 870. Accordingly, the Courts have rigorously applied this bedrock principle to the Board. "The Board is not at liberty to ignore its prior decisions, [*citation omitted*] but must instead provide a reasoned justification for departing from precedent . . . ." *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008). It "may not depart *sub silentio*, from its usual rules of decision to reach a different, unexplained result in a single case." *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36-37 (1st Cir. 1989). Accord,

Randell Warehouse of Arizona, Inc. v. NLRB, 252 F.3d 445, 448-49 (D.C. Cir. 2001) ("We have repeatedly told the Board that 'silent departure from precedent' will not survive judicial scrutiny.") When the Board fails to meet its obligation to confront its precedent, "its actions indicate that lack of reasoned articulation and responsibility that vitiates the deference we would otherwise show to its very considerable expertise in strictly labor matters." *Local 777*, 603 F.2d at 872. The Board flouted this principle when it departed from longstanding precedent interpreting Section 7's "concerted activities" protections for the special case of class arbitration of employment claims.

CONCLUSION

As the employer parties correctly argue in their principal briefs, deference is not due to the Board in this instance because it has no expertise in the interpretation of the FAA. Moreover, no deference is even due here to the Board's interpretation of Section 7's protection of "concerted activities," because *D.R. Horton* was a "silent departure" from longstanding Board precedent. In the absence of any deference owed to the views of the Board, this Court's task of reconciling the FAA and the NLRA is comparatively simple: the waiver of class arbitration in an otherwise-enforceable agreement to arbitrate employment-related disputes is not a violation of the Section 7 of the NLRA, and the rule of *D.R. Horton* must fall.

Respectfully submitted,

STEVEN B. KATZ
Counsel of Record
CONSTANGY BROOKS SMITH
& PROPHETE LLP
2029 Century Park East, Suite 1100
Los Angeles, CA 90067
(310) 909-7775
skatz@constangy.com

Counsel for Amicus Curiae

RECORD AND BRIEFS

Supreme Court U.S.
FILED
JUN 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300, 16-307

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NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

MURPHY OIL USA, INC., ET AL.

On Writs of Certiorari
to the United States Courts of Appeals
for the Fifth, Seventh, and Ninth Circuits

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING EPIC SYSTEMS CORP., ERNST & YOUNG LLP, AND MURPHY OIL USA, INC.

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Suite 800
Washington, DC 20001

WILLIAM M. JAY
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

June 16, 2017

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INTEREST OF THE *AMICUS CURIAE*[1]

The Business Roundtable (BRT) is an association of chief executive officers who lead companies with nearly 15 million employees and more than $6 trillion in annual revenues. The combined market capitalization of the BRT's member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and BRT members invest more than $100 billion annually in research and development—equal to 30 percent of U.S. private R&D spending. The BRT's member companies pay over $220 billion in dividends to shareholders and generate more than $400 billion in revenues for small and medium-sized businesses annually. BRT companies also make more than $7 billion a year in charitable contributions. The BRT was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and participate in litigation as *amici curiae* where important business interests are at stake.

These consolidated cases present the question whether the National Labor Relations Act (NLRA) invalidates employment agreements that require employee-employer disputes to be resolved through individual arbitration, not collective adjudication such as a class action. For years, many of the BRT's members

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[1] All parties have consented to the filing of this brief. Blanket consents by all parties in Nos. 16-285 and 16-300 and respondent in No. 16-307 are on file with the Clerk. Consent by petitioner in No. 16-307 is submitted with this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

have entered into contractual relationships with their employees that incorporate similar arbitration provisions. Rulings that render class-action waivers unenforceable, like the Seventh and Ninth Circuits' determinations below, jeopardize the reliance that many of the BRT's members have placed on having a speedy, efficient, and cost-effective means of resolving disputes with their employees.

SUMMARY OF ARGUMENT

A. For over a century, employment agreements have contained arbitration provisions in varying forms. These provisions grew in popularity with employers after courts began enforcing them under the Federal Arbitration Act (FAA). That popular momentum reached its peak after this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which effectively held that an arbitration provision may be enforced under the FAA for a broad range of employee claims—including allegations of employment discrimination. The practice of including arbitration provisions in individual employment agreements has only grown since *Gilmer*.

B. Class action waivers are relatively new, crafted in response to an erosion of the understanding that an arbitration provision necessarily excludes the possibility of a classwide proceeding. Class arbitrations were largely an anomaly (and thus unaddressed) until 2003, when a plurality of this Court implicitly recognized the validity of such proceedings in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The *Bazzle* plurality opined that an arbitration provision's silence as to class arbitrations could potentially be construed by an arbitrator as allowing for class arbitrations. In response, employers began

incorporating class action waivers into their employment agreements. A majority of this Court corrected the *Bazzle* plurality's observation in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), but by then, the waivers had become de rigueur in many employment agreements. Uncertainty caused by this Court's decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), only solidified the trend.

C. Class action waivers are the only means of ensuring that arbitration remains a "matter of consent." *Stolt-Nielsen*, 559 U.S. at 684. A holding that renders such waivers void under the NLRA would force employers to undergo "arbitration" that is bereft of the benefits of arbitration, shorn of the efficiency and cost savings that make arbitration favored in the first place. Nothing in the collective bargaining provisions of the NLRA compels such a result.

ARGUMENT

A. Arbitration agreements have long been used in individual employment agreements, rooted in a strong federal policy favoring arbitration.

Contracts between employers and employees have incorporated arbitration provisions for a century, even before the Federal Arbitration Act (FAA). Over that period, a series of this Court's decisions have reaffirmed that the parties to a contract may select an arbitral forum by mutual consent, and that employers and employees are no exception. Each decision in that line of cases has heightened employers' justifiable reliance on the efficiency and enforceability of arbitration provisions.

Some early arbitration provisions called for only limited review. *See, e.g.*, *Fabricand v. Nortz*, 170 N.E. 129, 129 (N.Y. 1929) (per curiam) (arbitration of a certain clause of an employment agreement). Others were broad in scope, allowing all manner of employment disputes to be heard in arbitration. *See, e.g.*, *Abshire v. City Ry. Co.*, 4 Ohio Law Abs. 144, 144, 1925 WL 3954 (Ohio 1925) (under employment contract, "any grievances which might arise in the future would be submitted for arbitration").

Arbitration proceeded to gain greater acceptance, including through Congress's endorsement of the principle that disputes over rights secured in a collective bargaining agreement should be arbitrated. *See, e.g.*, *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377 (1974) (observing, in a Labor Management Relations Act case, that "[t]he federal policy favoring arbitration of labor disputes is firmly grounded in congressional command"); *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W. R.R.*, 321 U.S. 50, 58 (1944) (Railway Labor Act and Norris-LaGuardia Act were intended to "encourage use of the nonjudicial processes of negotiation, mediation, and arbitration for the adjustment of labor disputes"); *cf. NLRB v. Acme Indus. Co.*, 385 U.S. 432, 439 (1967) (upholding NLRB order based on the "express terms of the [NLRA]" and "the national labor policy favoring arbitration"); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962) (the "basic policy" of "national labor legislation" is "to promote the arbitral process as a substitute for economic warfare").

During that same period, some courts were suspicious of agreements to arbitrate individual employment claims. *See* Stephen J. Ware, *Employment Arbitration & Voluntary Consent*, 25 Hofstra L. Rev. 83, 95-96 (1996). The result was fewer arbitration clauses in individual employment agreements than there might otherwise have been. *See id.* at 95. But despite that modest disincentive, some employers continued inserting arbitration provisions into individual employment agreements. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), for example, concerned a provision in an employment contract that required arbitration administered by the American Arbitration Association under New York law. An employee brought an unlawful-discharge claim in Vermont state court. *Id.* at 199. This Court held that the agreement was not governed by the FAA (because the contractual relationship did not satisfy the jurisdictional element), *id.* at 200-01, but that the question of enforceability was a question of Vermont law.

In the 1970s, a new trend began to emerge in which federal courts found that arbitration provisions in individual employment agreements were indeed enforceable under the FAA. These courts based their enforceability determinations on section 2 of the FAA, something that the *Bernhardt* Court refused to do. *See, e.g.*, *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *Legg, Mason & Co., Inc. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367, 1371 (D.D.C. 1972). In *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972), for example, the Second Circuit held that a basketball club could rely on section 2 of the FAA, 9 U.S.C. § 2, to enforce an "arbitration clause . . . as broad as can be imagined" against one of its star athletes, Julius "Dr.

J." Irving. *Id.* at 1067. Irving tried to argue that his contract did not "involv[e] commerce," and that in any event, section 1, which exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," prevented enforcement of the subject arbitration clause under the FAA. *Id.* at 1068-69. The court of appeals disagreed, concluding that: (1) professional athlete contracts for any sport other than baseball are "a subject of interstate commerce"; and (2) section 1 of the FAA did not prohibit enforcement because that provision applies "only to those actually in the transportation industry," i.e., "employees involved in, or closely related to the actual movement of goods in interstate commerce." *Id.*[2]

Even with this trend, however, enforcement of employment arbitration provisions under the FAA was by no means guaranteed. For example, courts were reluctant to send certain statutory claims to arbitration as a matter of policy. *See, e.g., Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271, 277 (E.D. Pa. 1977) ("[T]he competing policies of the Federal Arbitration Act and ERISA are not easily reconciled."). In particular, courts found employment discrimination claims to be unsuitable for arbitration, citing this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and its conclusion that

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[2] This Court later adopted the Second Circuit's position in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *See id.* at 119 ("In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA.").

"the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII," *id.* at 59-60. *See, e.g., Utley v. Goldman Sachs & Co.*, 883 F.2d 184, 186 (1st Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-06 (8th Cir. 1988) ("The analysis of *Alexander* lends strong support that Congress did not intend federal judicial proceedings in discrimination cases to be preempted by employment arbitration provisions enforceable under the FAA."). While these courts recognized that broad deference to the federal policy favoring arbitration was given in other areas, employment discrimination lawsuits were simply of a different kind and character. *See Utley*, 883 F.2d at 186 ("Notwithstanding this policy [favoring arbitration], however, the Court has done nothing to disturb its prior ruling in *Alexander* that arbitration agreements do not preclude an independent right of access to a judicial forum for resolution of Title VII claims."). While employers' confidence in the enforceability of individual employment arbitration provisions grew in the 1970s and 1980s, the exceptions carved out by courts left employers uncertain as to the arbitration provisions' enforceability and versatility in enforcement.

It was not until this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that employers could believe with certainty that individual employment arbitration provisions could be used to resolve a broad range of disputes. *See* Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Pre-*

dispute Arbitration Agreements: Back to the Future, 18 Ohio St. J. on Disp. Resol. 249, 281 (2003) (suggesting that the FAA did not "reemerge[] as a workplace dispute resolution law" until 1991, when the Court decided *Gilmer*). In *Gilmer*, a manager employed by a stock brokerage sued his employer over an alleged violation of the Age Discrimination in Employment Act of 1967 ("ADEA"). The employer moved to compel arbitration, citing an arbitration provision that the employee had agreed to when he first joined the employer in 1981. The employee argued that allowing arbitration of discrimination claims such as ones brought under the ADEA would be inconsistent with "the statutory framework and purposes of" the anti-discrimination statutes. *Gilmer*, 500 U.S. at 26-27.

This Court disagreed. And in doing so, it gave employers guidance as to the broad scope of arbitration provisions—to wit, what could and could not be arbitrated. The *Gilmer* Court began with a sweeping reaffirmation of the principle that "statutory claims may be the subject of an arbitration agreement." *Id.* at 26. It also reiterated that, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)).

There was no exception to this rule for anti-discrimination statutes—they, too, were subject to the "healthy regard for the federal policy favoring arbitration." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). While the Court acknowledged that "the ADEA is designed not

only to address individual grievances, but also to further important social policies," it did not "perceive any inherent inconsistency between those policies . . . and enforcing agreements to arbitrate age discrimination claims." *Id.* at 27. Arbitration, like litigation, could be used to "further broader social purposes" through the resolution of individual claims. *Id.* at 28. Although certain procedural aspects of arbitration, such as discovery, were more limited than ordinary litigation, the Court did not perceive that as an impediment because "a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Id.* at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

After *Gilmer*, arbitration provisions were more widely incorporated into individual employment agreements. In 1995, the General Accounting Office reported that about 10% of employers with more than 100 employees used arbitration as a dispute resolution mechanism, with an additional 8.4% of employers considering arbitration. U.S. Gen. Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* 7-8 (July 1995). A 1997 survey of 36 mostly "well-known, national companies" showed that, while certain employment arbitration policies dated back "50 and 40 years," "[e]ighty-five percent of the [arbitration] procedures reported in the survey were implemented within the last five years, since *Gilmer* was decided," with 20% of arbitration policies being implemented between 1995 and 1997. Mei L. Bickner et al., *Developments in Employment Arbitration*, 52 Disp. Resol. J. 8, 77-78 (Jan. 1997). The Equal Employment Opportunity Commission ("EEOC"), resisting *Gilmer* but acknowledging its

precedential value, observed in 1997 that "[a]n increasing number of employers are requiring as a condition of employment that applicants and employees . . . agree to resolve disputes through binding arbitration." EEOC Notice No. 915.002 (July 10, 1997). The EEOC also observed that all manners of employers, such as "the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services" were increasingly incorporating arbitration provisions in their individual employment agreements. *Id.* In 2000, the American Arbitration Association ("AAA") reported that "more than 500 employers and 5 million employees worldwide" relied on the AAA to resolve disputes. Am. Arbitration Ass'n, *Proud Past, Bold Future* 27 (2000), *available at* https://www.adr.org/sites/default/files/document_repository/2000%20Annual%20Report_0.pdf. There was little question that *Gilmer* encouraged employers to "increasingly require employees to sign pre-dispute compulsory arbitration agreements." Geraldine S. Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395, 398 n.6 (1999). The popularity of individual employment arbitration provisions only grew as lower courts made clear that *Gilmer* applied to "arbitration agreements involving occupations outside the securities industry . . . and [] to federal employment statutes other than the ADEA." Leroy, *supra*, at 284-85.

In short, since *Gilmer*, there has been "a consistent pattern of significant expansion of employment arbitration." Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Employee Rts. & Emp. Pol'y J. 405, 411 (2007). And the overall trend over the life of the FAA

has shown ever-increasing reliance on arbitration in the employment context: substantial numbers of employment contracts contain arbitration provisions and depend on their enforceability.

B. Class action waivers are a recent phenomenon intended to preserve a protection long understood to be a key characteristic of arbitration: the *individual* resolution of claims.

Even as arbitration has grown in utility, popularity, and acceptance, one point has remained constant: arbitration has long been known as a device for deciding *individual* disputes. Even in the last 20 years, the notion that arbitral proceedings could entertain classwide claims—much less be *compelled* to entertain classwide claims as some sort of workplace entitlement—was foreign to the practice of arbitration.[3] Courts had perceived class actions and arbitrations as mutually exclusive devices—thus, there was little need to contemplate how the two would intersect. *See, e.g.*, *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 94 (N.Y. App. Div. 1981) ("[I]t is clear . . . that the interests favoring arbitration should prevail over those favoring the class action, both in general and in the present instance."), *aff'd*, 56 N.Y.2d 627 (1982); *Vernon*

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[3] *E.g.*, Edward W. Dunham, *The Arbitration Clause as Class Action Shield*, 16 Franchise L.J. 141, 142 (1997) ("An arbitration clause may not be an invincible shield against class action litigation, but it is surely one of the strongest pieces of armor available to the franchisor."); *see* Hans Smit, *Class Actions in Arbitration*, 14 Am. Rev. Int'l Arb. 175, 176 (2003) ("[T]he preference for arbitration may be inspired in part by the perceived lack of class actions in arbitration . . . .").

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B. Class action waivers are a recent phenomenon intended to preserve a protection long understood to be a key characteristic of arbitration: the *individual* resolution of claims.

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v. Drexel Burnham & Co., 125 Cal. Rptr. 147, 153 (1975) ("Finally the substantive law of contractual agreement [an arbitration provision] takes precedence over the class action, which is merely a procedural device for consolidating matters properly before the court.").

Class arbitration waivers therefore have a shorter pedigree than arbitration clauses themselves, for the simple reason that the notion of a class arbitration is itself a recent one. In the 1970s and 1980s, the commercial arbitration rules of certain arbitral forums, such as the American Arbitration Association (AAA), were silent as to the availability of classwide relief. That silence, combined with arbitral rules limiting remedies to "the scope of the agreement of the parties," was understood to prohibit class arbitration. *See Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 228 (3d Cir. 1989), *abrogated on other grounds by Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

The first judicial decision opening the door to class arbitration was *Keating v. Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), in which the California Court of Appeal held that there was "no insurmountable obstacle to conducting an arbitration on a classwide basis." *Id.* at 492.[4] The only court to follow suit (at least in a reported decision) was the Pennsylvania

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[4] This case eventually came before this Court in the form of *Southland Corp. v. Keating*, 465 U.S. 1 (1984). But the Court did not reach the issue of class arbitration because the California Supreme Court had not passed upon "the question whether superimposing class action procedures on a contract arbitration was contrary to the federal [Arbitration] Act." *Id.* at 9.

Superior Court. *See Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

By and large, however, "very few arbitrations ha[d] been handled as class actions" up until 2000.[5] And arbitral forums were largely unprepared for them.[6] For most of its existence, the AAA administered class arbitrations only when it was forced to do so, in the rare instances when a state court called for an anomalous classwide arbitration proceeding. *See Lewis v. Prudential Bache Secs., Inc.*, 225 Cal. Rptr. 69, 71, 75-76 (Cal. Ct. App. 1986) ("The superior court shall appoint the American Arbitration Association to arbitrate this matter.").

In the 1990s, arbitral forums began stating expressly whether class arbitration was allowed or disallowed. The New York Stock Exchange in *Gilmer*, for example, expressly allowed "collective proceedings," a fact that this Court ultimately deemed immaterial to its holding that employment discrimination suits could be decided by a private arbitrator, rather than a court. *See* 500 U.S. at 32 ("But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at concili-

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[5] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 40 n.148 (2000).

[6] David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 56 & n.1 (2007) (noting that the American Arbitration Association adopted class arbitration provisions in 2003).

ation were intended to be barred.'" (quoting *Nicholson*, 877 F.2d at 241 (Becker, J., dissenting))). In contrast, the National Arbitration Forum disallowed class arbitrations,[7] going so far as to encourage "implement[ation of] arbitration provisions containing terms that expressly waive the right to class treatment" as a cautionary measure. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 397 (2005).

Given the relative infancy of class arbitrations, it is no surprise that class action waivers are of an even more recent vintage. *Id.* These waivers were first publicly suggested in the late 1990s, with "trade-journal articles . . . encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations." *Id.* at 396. "Practice soon followed these practice pointers, such that waivers of class-wide arbitration [became] common features of arbitration clauses in consumer contracts." Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1898 (2006). Employers, too, began using such waivers to "avoid classwide exposure in the employment context." Gilles, *supra*, at 419.

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[7] David G. Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 Am. J. Trial Advoc. 111, 112 n.4 (2000) ("And under the rules of the National Arbitration Forum . . . consumers cannot join in class action lawsuits . . . ." (quoting *Consumers Losing Right to Sue*, USA Today, Feb. 1, 2000, at 13A))).

Businesses began incorporating class action waivers apace after this Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). James E. McGuire & Bette J. Roth, *Class Action Arbitrations: A First Circuit Update*, 52 Boston Bar J. 17, 18 (2008). In *Bazzle*, a plurality of the Court held that an arbitration provision was silent as to the availability of class arbitration and left it to the arbitrator to decide "whether the agreement forbids class arbitration." 539 U.S. at 451.

Rather than take the "non-trivial risk that an arbitrator will entertain class or collective actions in the absence of" a clause governing such actions, "many employers . . . incorporate[d] explicit 'no-class action' clauses" into their arbitration policies, as a prophylactic response to *Bazzle*. Samuel Estreicher & Steven C. Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, 233 N.Y. L.J. 3 (June 10, 2005). They did so by "amend[ing] their standard employment contract and requir[ing] existing employees to agree to the new terms as a condition of continued employment." McGuire, *supra*, at 17.

This Court addressed the interpretive issue head-on in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), holding that a silent agreement did *not* permit class arbitration by its silence. The Court held that silence could not be necessarily construed as consent to class arbitration—that "a party may not be compelled under the FAA to submit to class arbitration under there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 684.

Businesses nevertheless continued to include "explicit class action waivers in their arbitration agreements," even *after Stolt-Nielsen*.[8] They remained nervous about the possibility that silence on the issue of class actions in the employment agreement could still be construed as consent to class arbitration, in light of this Court's subsequent decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). The *Oxford* Court determined that an arbitrator could discern approval for class proceedings from an arbitration provision that lacked any express clause concerning class arbitration, so long as the parties consented to the arbitrator's authority to interpret the contract. *Id.* at 2070-71. Because of *Oxford*, silence as to the issue of class adjudication in an arbitration provision continued to "'spell[] potential danger' for businesses seeking to avoid class actions"—thus encouraging businesses to continue incorporating express class action bars in their agreements. Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under Conception: Reason and Reasonableness Deflect Strident Attacks*, 68 Ark. L. Rev. 669, 723 (2015). That practice continues to this day.

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[8] Kate W. Moss, *ERISA and Arbitration: How Safe Is Your 401(k)?*, 64 DePaul L. Rev. 773, 793 (2015).

C. Invalidating class action waivers under the National Labor Relations Act's collective bargaining provisions and imposing class arbitration on employers would largely undo the benefits of arbitration.

This Court is well familiar with the benefits of bilateral arbitration, which are the same regardless of whether the arbitration takes place in the context of employment or some other business relationship. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). The bargain of bilateral arbitration is straightforward: "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen*, 559 U.S. at 685. Administering arbitral disputes on an *individual* basis is the only way of accomplishing the objectives of the FAA: the "quick, simple, and inexpensive" resolution of disputes. Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 Harv. Negot. L. Rev. 399, 433 (2008).

If the Court holds that class action waivers are no longer valid because they lie in tension with the NLRA's collective bargaining provisions, there is only one result that follows in light of existing arbitration provisions: employers will unwillingly be subject to class arbitrations, to which they never agreed and in-

deed expressly disavowed. As this Court recognized in *Stolt-Nielsen*, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." 559 U.S. at 685. Compared to traditional bilateral arbitration, "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id.* at 685-86. "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). Class arbitration imposes a level of procedural formality that is anomalous for a typical arbitration and "increases risks to defendants" by stripping certain procedural protections accorded to class actions in court. *Id.* at 349-50.

Class arbitration "eliminates many of the benefits of having arbitration in the first place." Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1710 (2005). "When class action-like procedures are grafted onto arbitration," the arbitration process loses the benefits of lower costs and higher efficiency attendant to the arbitration of individual claims. *Id.* at 1712. A class arbitration instead becomes encumbered with "due process problems inherent in class arbitration that must be resolved through increased judicial supervision," which defeats the point of having an arbitration in the first place—

removing a court from the equation. *Id.* That loss of efficiency and cost savings has a bottom-line impact on consumers and employees: it "reduces savings which would otherwise be passed on . . . in the form of lower product prices [for consumers] and higher employee salaries." William H. Baker, *Class Action Arbitration*, 10 Cardozo J. Conflict Resol. 335, 364 (2009).

Federal labor law endorses labor arbitration in order to minimize disruption and to fashion a "uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). The same twin goals of minimizing disruption and promoting uniformity apply to individual, bilateral arbitrations. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). Not so with class arbitrations. Class arbitrations can hardly be considered uniform, given that they pick up the ballast of "additional and different procedures," generating "procedural morass" that "makes the process go slower [and] more costly." *AT&T Mobility*, 563 U.S. at 348. The cumbersome nature of that anomalous proceeding has a disruptive effect for both employers and employees alike, with ripple effects reaching consumers served by those employers.

In light of this Court's post-*Bazzle* precedents and their erosion of the presumption that arbitration provisions preclude class actions, *see Harris*, 441 N.Y.S.2d at 94, the only means of ensuring that arbitration remains "a matter of consent," *Stolt-Nielsen*, 559 U.S. at 684, is to allow for express class action waivers. Nothing in the NLRA strips an employer of its ability to withhold that consent.

CONCLUSION

The judgments of the courts of appeals should be reversed in *Epic Systems Corp. v. Lewis*, No. 16-285, and *Ernst & Young LLP v. Morris*, No. 16-300. The judgment of the court of appeals in *National Labor Relations Board v. Murphy Oil USA, Inc.*, No. 16-307, should be affirmed.

Respectfully submitted.

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Ave., N.W.
Suite 800
Washington, DC 20001

WILLIAM M. JAY
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinlaw.com
(202) 346-4000

June 16, 2017

RECORD
AND
BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300 & 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,

v.

JACOB LEWIS, *Respondent*.

ERNST & YOUNG LLP, ET AL., *Petitioners*,

v.

STEPHEN MORRIS ET AL., *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MURPHY OIL USA, INC., ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). Because the simplicity, informality, and expedition of arbitration depend on the courts' consistent recognition and application of the principles underlying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, the Chamber and its members have a strong interest in these cases.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, the National Labor Relations Board ("the Board" or "NLRB") held that class and collective actions are "other concerted activities" protected under Section 7 of the National Labor Relations Act ("NLRA"); that agreements between employers and

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties except the NLRB have filed blanket consents to the filing of *amicus curiae* briefs. The written consent of the NLRB to this filing has been filed concurrently with the brief.

employees to arbitrate disputes on an individual basis therefore constitute an "unfair labor practice" under Section 8 of the NLRA; and that the FAA does not preclude the Board from declaring such agreements unenforceable. *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, enf. denied in pertinent part *sub nom. D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013). These three consolidated cases require the Court to review the Board's conclusion that the otherwise-applicable protections of the FAA are displaced by the NLRA.

This Court has long recognized the general principle that federal statutes should not be interpreted to impliedly repeal or otherwise conflict with the commands of other federal laws. *Morton* v. *Mancari*, 417 U.S. 535, 545-551 (1974); see also *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264 (2007); *United States* v. *Fausto*, 484 U.S. 439 (1988).

The Court has applied that principle frequently in the context of the FAA, addressing alleged conflicts between that statute and six different federal laws. As a result, the Court has distilled the general governing principles into a more particularized test applicable when a federal statute is claimed to conflict with the FAA. That test asks whether the other federal statute contains a "contrary congressional command" overriding the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012). There is no such contrary congressional command here. Indeed, the NLRB's contorted effort to avoid this test underscores the flaws in its position.

The statute relied on by the NLRB as the basis for the *D.R. Horton* rule—Section 7 of the NLRA—

does not contain a "contrary congressional command" that overrides the FAA. As this Court has made clear (most recently in *CompuCredit*), a statute must expressly mention arbitration in order to displace the FAA, and the NLRA says nothing about arbitration. Indeed, Section 7 does not mention class actions or joint litigation—and its general reference to "other concerted activities" is at the very most ambiguous about whether such activities are protected, which is insufficient to overcome the FAA.

The two other exceptions to the FAA's mandate also offer no support for the *D.R. Horton* rule. The first—the so-called "effective vindication" exception—applies only when an arbitration agreement bars a claimant from invoking a federal cause of action. There is no such prohibition here. The NLRB argues that arbitration agreements abridge employees' statutory right to pursue class or collective actions, but that argument rests on a conceptual flaw and legal error: class and collective actions are a *procedural* mechanism, not a substantive right, and in any event, the NLRA does not confer any "right" to engage in class or collective actions.

The final exception to the FAA—its "savings clause"—is also inapposite. The savings clause saves *state* contract laws of general applicability from FAA preemption; it does not apply to *federal* laws, which are subject to this Court's "contrary congressional command" test. Moreover, even if the savings clause applied to federal laws, the *D.R. Horton* rule would not implicate the clause's protections. This Court squarely held in *Concepcion* that the savings clause does not "save" rules prohibiting waivers of class procedures, because such rules interfere with the bilateral nature of arbitration and thus "create[] a

scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

Nor are policy objections against arbitration a valid basis for overriding the FAA. By enacting the statute, Congress adopted a federal policy favoring arbitration, which cannot be set aside by courts. Congress's judgment, moreover, was and is sound: protecting the enforceability of arbitration agreements benefits employers and employees alike. Most workplace grievances are individualized and therefore could not be pursued as part of a class or collective action. Indeed, without individual arbitration, most of those claims could not be pursued at all. The best empirical data available show that employees fare at least as well in arbitration as in litigation, if not better; and that litigation in court is frequently too expensive to serve as a realistic option for employees seeking to vindicate their rights.

ARGUMENT

I. THE FAA BARS THE *D.R. HORTON* RULE.

These consolidated cases require the Court to address the interaction of two federal statutes—the FAA and the NLRA.

The FAA. Enacted in 1925, the FAA was intended to "'reverse the longstanding judicial hostility to arbitration agreements'" (*EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002)) and substitute "an 'emphatic federal policy in favor of arbitral dispute resolution'" (*KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985))).

The statute provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In the absence of such generally applicable grounds, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (emphasis, quotation marks, brackets, and citations omitted).

The FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration" or class proceedings in court. *Id.* at 2308 (quotation marks omitted); see also *Imburgia*, 136 S. Ct. at 471 (reiterating that state courts must enforce arbitration agreements containing class waivers); *Concepcion*, 563 U.S. at 340, 352. Because the arbitration agreements in these cases all require disputes to be arbitrated on an individual basis and prohibit class proceedings, they fall squarely within the FAA's protection against invalidation.

The NLRA. The NLRA was enacted in 1935 to "encourag[e] the practice and procedure of collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

Section 7 of the Act affords employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157. Section 8, in turn, makes it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of" these rights. *Id.* § 158(a)(1).

In *D.R. Horton*, the Board held that a class or collective lawsuit in court is a form of "concerted activit[y]" under Section 7 and that agreements to arbitrate disputes on an individual basis infringe upon that right in violation of Section 8. It further concluded that the FAA did not preclude invalidation of such arbitration agreements, notwithstanding this Court's holdings in *Concepcion* and *Italian Colors*.

Because the FAA mandates that arbitration agreements be enforced according to their terms—including terms requiring bilateral arbitration—the Board's holding in *D.R. Horton* conflicts with the FAA and must give way unless an exception to the FAA applies. None does.

A. The NLRA Does Not Contain A "Contrary Congressional Command" Overriding The FAA.

When, as here, a party maintains that another federal statute provides grounds for invalidating an arbitration agreement, this Court has asked whether the other federal statute contains a "contrary congressional command" overriding the FAA's mandate that arbitration agreements be enforced according to their terms. *CompuCredit*, 565 U.S. at 98.

The Court explained more than thirty years ago that "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agree-

ments to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627. And it has hewed to that approach ever since.

The NLRB and other parties seeking to invalidate employment-arbitration agreements have for the most part sought to avoid the "contrary congressional command" standard—presumably because they recognize that they cannot satisfy it. But "in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement," this Court "begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." No. 16-300 Pet. App. 29a (Ikuta, J., dissenting).

There is no such congressional command in the NLRA.

1. The "contrary congressional command" standard.

The heavy burden on the party seeking to invoke the "contrary congressional command" exception is clear from this Court's consistent rejections of attempts to invoke it. The Court has assessed six federal statutes and found that not one contained the "contrary congressional command" needed to displace the Federal Arbitration Act. *Italian Colors*, 133 S. Ct. at 2309 (Sherman Act); *CompuCredit*, 565 U.S. at 104 (Credit Repair Organizations Act); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (Age Discrimination in Employment Act); *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (Securities Act of 1933, overruling *Wilko* v. *Swan*, 346 U.S. 427 (1953)); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 238, 242 (1987) (Securities Act of 1934 and RICO); *Mitsubishi*

Motors, 473 U.S. at 640 (Sherman Act); see also *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 89-90 (2000) (undisputed that Truth in Lending Act claims are arbitrable).

That consistency is not surprising. "The burden is on the party opposing arbitration * * * to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 227. And that intent must be explicitly expressed: If a statute is "silent on whether claims * * * can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *CompuCredit*, 565 U.S. at 104.

This standard requires Congress to speak with "clarity," by precluding arbitration, or an aspect of arbitration protected by the FAA, expressly in the text of the statute if it wishes to override the FAA. *Id.* at 103. "[O]btuse" legislative language is insufficient to support the conclusion that Congress intended to displace the FAA's enforcement mandate. *Ibid.*

The *CompuCredit* Court pointed to other statutory provisions as examples of the requisite clarity—each expressly limited the enforceability of arbitration agreements in specified circumstances. *Id.* at 103-04 (for example, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.")).

Finally, because the Court "resolve[s] doubts in favor of arbitration," if the parties' arguments are "in equipoise," this Court's "precedents require" that the agreement to arbitrate be enforced. *Id.* at 109

(Sotomayor, J., joined by Kagan, J., concurring) (citing *Gilmer*, 500 U.S. at 26).

To constitute a "contrary congressional command" sufficient to override the FAA, therefore, the NLRA must contain clearer language than the statutes involved in all of this Court's prior cases. What is required is statutory language clearly displacing the FAA's protection of arbitration agreements generally or bilateral arbitration in particular. The NLRA does not come close to satisfying that standard.

2. The NLRA's text contains no indication that Congress displaced the FAA's protection of arbitration agreements.

The text of the NLRA does not mention arbitration, class actions, or even bringing actions in court. That fact alone is dispositive of the issue.

Because the statute is "silent" on these matters, "the FAA requires [an] arbitration agreement to be enforced according to its terms." *CompuCredit*, 565 U.S. at 104; see also *D.R. Horton* v. *NLRB*, 737 F.3d at 361 (noting that Congress "did not discuss the right to file class or consolidated claims against employers" in the NLRA); *Iskanian* v. *CLS Transp. L.A., LLC*, 327 P.3d 129, 141 (Cal. 2014) (Liu, J.) ("[N]either the NLRA's text nor its legislative history contains a congressional command prohibiting [class] waivers.").

Even a mention in the statute of class actions or concerted litigation would not be sufficient. The Credit Repair Organizations Act expressly allows plaintiffs to bring actions in court, expressly specifies standards governing class actions, and prohibits the

waiver of "any right * * * under this sub-chapter." 15 U.S.C. § 1679f(a). This Court nonetheless held that these provisions failed to "do the heavy lifting" necessary to displace the FAA. *CompuCredit*, 565 U.S. at 100.

The Age Discrimination in Employment Act ("ADEA") goes even further, expressly providing for collective actions (29 U.S.C. § 626(b))—yet the Court held that this was likewise insufficient to override the FAA. *Gilmer*, 500 U.S. at 32; see also *Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions.").[2]

The Board has suggested that Section 7's reference to "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" provides the "clarity" required to override the FAA. No. 16-307 Pet. App. 45a-46a. But the "contrary congressional command" standard requires, at a minimum, statutory text that clearly and unambiguously protects class-action lawsuits.

To begin with, contrary to the Board's assertion, this Court has never even addressed whether Section 7 applies to lawsuits in court.[3] And it has never ap-

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[2] Federal courts of appeals have uniformly held that there is no congressional command to preclude arbitration of claims under the Fair Labor Standards Act, which contains precisely the same authorization of opt-in class actions as the ADEA. *Walthour* v. *Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330-37 (11th Cir. 2014) (joining Second, Fifth, and Eighth Circuits).

[3] In holding that class actions fall within the "other concerted activities" catch-all, the Board relied heavily on *Eastex, Inc.* v.

plied the "contrary congressional command" test to the NLRA. The statutory text falls far short of what is required to displace the protection for arbitration agreements that Congress enacted in the FAA.

First, Section 7 does not mention class actions; indeed, it does not mention litigation. Just as the *CompuCredit* Court indicated that an express reference to limiting the enforceability of arbitration agreements would be needed to make a federal claim nonarbitrable (see pages 9-10, *supra*), displacement of the FAA's protection of bilateral arbitration requires an express reference to class actions, or at least to joint litigation. But there is no such reference in the NLRA.

Moreover, the vague text on which the Board relies points *away from* the inclusion of class-action lawsuits. The phrase "other concerted activities" follows a list of *non*-litigation conduct: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing."

"[W]here general words follow specific words in a statutory enumeration, the general words are con-

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NLRB, 437 U.S. 556 (1978). But that case involved the distribution of newsletters, not litigation. This Court stated only that "*it has been held that* the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums"—citing lower court rulings in support of that proposition. *Id.* at 565-66 & n.15 (emphasis added). Moreover, the Court expressly disclaimed any determination as to whether Section 7 encompasses litigation—by following its citation of those lower-court decisions with the statement that "we do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15.

strued to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quotation marks omitted). Under this "'familiar'" canon of statutory construction, "'catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.'" *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014) (brackets omitted) (quoting *Fed. Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)). Both the indeterminate nature of the phrase "other concerted activities" and this principle of interpretation weigh heavily *against* the Board's contention that the term "other concerted activities" clearly and unambiguously includes joint litigation in court.

Section 7's catch-all phrase refers to "other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*." The reference to "mutual aid or protection" following the specified protected activities—"self-organization, to form, join, or assist labor organizations, to bargain collectively"—strongly indicates that protected "concerted activit[ies]" include only *self*-help measures to realize the participatory and substantive rights conferred by the NLRA. Certainly, "other mutual aid or protection" does not clearly and unambiguously encompass class actions in general, and particularly not class actions grounded in employees' individual claims under other statutes to obtain damages or other compensatory relief.

Indeed, Section 7's reference to concerted activities *cannot* have been intended to confer a right to engage in class actions, because the NLRA was en-

acted "prior to the advent in 1966 of modern class action practice." *D.R. Horton*, 737 F.3d at 362; see also *Iskanian*, 327 P.3d at 141. Simply put, Congress could not have intended to protect "a right of access to" "procedure[s] that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362.

This Court employed precisely that reasoning in *Italian Colors*. There, the Court held that the antitrust laws did not preclude arbitration provisions containing class-action waivers, in part because the Sherman and Clayton Acts "make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23." 133 S. Ct. at 2309.[4]

Critically, *Chevron* deference has no role to play in determining whether there has been a "contrary congressional command" sufficient to override the FAA. That is because the decision to displace the protections that Congress enacted in the FAA must be made *by Congress*. A statute that is silent or am-

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[4] Even if it were permissible to construe Section 7 to cover concerted litigation activity, "there is nothing inherently 'concerted' about the class action. * * * A single plaintiff can litigate a class action to completion without any intervention by or material support from any other class members." *NLRB* v. *Alternative Entm't, Inc.*, 2017 WL 2297620, at *16 (6th Cir. May 26, 2017) (Sutton, J., concurring in part and dissenting in part); see also No. 16-307 Pet. App. 148a (NLRB Member Johnson, dissenting) (emphasis in original) ("an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees"). While a class action may affect the rights of absent class members, the Board has never held that sufficient to make an action "concerted" for Section 7 purposes outside this context. See *id.* at 148a-154a; see also *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 829 n.6 (1984).

biguous with respect to whether litigation is even included by definition does not satisfy that requirement.

The *Chevron* standard *would* be relevant to the separate question whether Section 7's reference to "other concerted activities" protects litigation activity that does not implicate arbitration agreements. Specifically, if Section 7's text does not unambiguously *exclude* litigation activities, then, under current precedent, at least, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). If the Board's determination that the provision applies to litigation activities is reasonable, the statute's protections would apply to efforts to limit joint litigation activity outside the context of an arbitration agreement.

There is nothing discordant about that result. State statutory and common-law rules barring predispute waivers of a consumer or employee's right to pursue class actions are fully enforceable if not contained in arbitration agreements. See, *e.g.*, *Am. Online, Inc.* v. *Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Ct. App. 2001) (invalidating forum-selection clause that had effect of precluding class actions); *Dix* v. *ICT Grp., Inc.*, 161 P.3d 1016, 1025 (Wash. 2007) (same). And, although we are not aware of a decision addressing the question, the Credit Repair Organizations Act's anti-waiver provision might be interpreted to have the same effect, even though the *CompuCredit* Court concluded that it was insufficient to displace the FAA.

But concluding that Section 7 may be ambiguous as to group litigation outside the arbitration context

is not sufficient to displace the FAA: Because the Court "resolve[s] doubts in favor of arbitration," if the parties' arguments are "in equipoise," this Court's "precedents require" that the agreement to arbitrate be enforced. *CompuCredit*, 565 U.S. at 109 (Sotomayor, J., joined by Kagan, J., concurring in the judgment).

Second, even proof that the text of the statute clearly and unambiguously encompasses class actions would not be sufficient by itself to satisfy the *CompuCredit* test. A party seeking to invalidate an arbitration provision must show a "contrary * * * command"—in other words, that the statutory text demonstrates not just Congress's intent to confer a particular right, but also Congress's intent to displace the otherwise-applicable FAA protection for arbitration agreements. That is why the *CompuCredit* Court used statutory provisions explicitly declaring specified arbitration agreements unenforceable to illustrate the "contrary congressional command" principle.

Nothing in Section 7 provides the slightest indication that Congress intended to limit the otherwise-applicable protections for arbitration agreements. There is no reference to arbitration at all, let alone an indication that Congress wished to preclude or limit the FAA's applicability in this context.

It would be particularly peculiar to conclude that Congress in the labor context intended to displace an essential attribute of arbitration protected by the FAA, given the long history of the use of arbitration to resolve labor-related disputes. See, *e.g.*, *Textile Workers Union of Am.* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 458 (1957) (noting the "congressional policy toward settlement of labor disputes by arbitration").

Indeed, "the first Supreme Court decisions defending arbitration as a method of dispute resolution involved labor disputes in which unions used arbitration over the objections of industrial employers." *Alternative Entm't*, 2017 WL 2297620, at *12 (Sutton, J., concurring in part and dissenting in part).

It is therefore especially appropriate in this context to require a clear expression in the statutory text before concluding that Congress was limiting the long-established principle that parties to arbitration agreements may "specify with whom [they] choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (emphasis, citation, and quotation marks omitted). There is no such statement in the NLRA.

The NLRB and other parties seeking to invalidate arbitration agreements assert that the NLRA bars advance waivers of Section 7 rights. But the statute before this Court in *CompuCredit* contained both an express reference to the filing of class actions *and* an anti-waiver provision, yet the Court found that text insufficient to show the requisite contrary congressional command. See pages 9-10, *supra*. A waiver provision without explicit text protecting joint litigation therefore falls short of what is required to demonstrate that Congress displaced the FAA.

B. The *D.R. Horton* Rule Is Not Justified By The "Effective Vindication" Exception.

This Court has said that even in the absence of a clear congressional command overriding the FAA, there may be circumstances in which arbitration agreements need not be enforced because they would "prevent the effective vindication of a federal statu-

tory right." *Italian Colors*, 133 S. Ct. at 2310 (quotation marks omitted). This exception to the FAA's enforceability mandate—which the Court has never invoked to invalidate an arbitration provision—"finds its origin in the desire to prevent prospective waiver of a party's *right to pursue* statutory remedies." *Ibid.* (quotation marks omitted); see also *Gilmer*, 500 U.S. at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." (alterations in original)).

Like the "congressional command" exception, the "effective vindication" exception is narrow. The Court's precedents address this exception only in the context of arguments that arbitration would, as a practical matter, prevent a claimant from pursuing a cause of action (or a remedy for that cause of action) conferred by a federal statute. Thus, this exception (1) would permit invalidation of "a provision in an arbitration agreement forbidding the assertion of certain statutory rights"; and (2) might also "cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Italian Colors*, 133 S. Ct. at 2310-2311.

Neither of those circumstances is present here. There is no claim that the arbitration agreements at issue bar the assertion of the relevant claims under the FLSA. As in *CompuCredit*, the agreements to arbitrate must be enforced because they preserve "*the legal power to impose liability*" under the statutes creating the cause of action. 565 U.S. at 102. And there is no claim that fees associated with the arbitral forum present an obstacle to vindication of the claimed federal right.

Most important for present purposes, in *Italian Colors* the Court squarely held that class-action waivers in arbitration provisions do not prevent effective vindication of the antitrust laws, explaining: "The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938." 133 S. Ct. at 2311.

That should be the end of any "effective vindication" inquiry.

The Board nonetheless argues for creation of a new category of "effective vindication" claim. It argues that Section 7 confers a "substantive right" to engage in concerted litigation, the vindication of which is prevented by agreement to arbitrate disputes on an individual basis.

But the "contrary congressional command" inquiry assesses the very same question: whether Congress so clearly expressed its intent to displace the FAA that the protections provided by that statute should not apply. There is no reason to allow a second bite at the very same apple—and to do so under a standard that does not inquire directly whether *Congress* has made a decision to displace the FAA.

If Congress in the NLRA had created an inalienable right to bring class actions, the "congressional command" exception would be satisfied, and there would be no need to extend the "effective vindication" exception to procedures like class actions. By the same token, because Congress did not clearly override the FAA by including class actions within the plain terms of Section 7, stretching the "effective vindication" exception to cover the *D.R. Horton* rule

would enable circumvention of the "congressional command" standard that this Court has crafted to ensure vindication of the statutory rights that Congress conferred in the FAA.

Even if, contrary to our submission, it were appropriate to expand the never-applied effective-vindication exception, that exception does not apply here. The NLRB would have to show that (a) Section 7 confers a "substantive right"; (b) Congress itself incorporated class actions within that right; and (c) bilateral arbitration prevents vindication of that right. The Board fails on each count.

First, the Board contends that the NLRA is "*sui generis*" (No. 16-307 Pet. App. 43a)—that, unlike other employment statutes that create a mere procedural right to participate in class or collective actions, the NLRA makes collective legal actions a "core substantive right" (*id.* at 40a). But there is no principled basis for distinguishing Congress's express authorization of class actions in the Credit Repair Organizations Act and the ADEA from the Board's reading of "other concerted activities" to include class actions.

Moreover, as this Court has explained, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980); see also, *e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997) (noting that Rule 23 does not "abridge, enlarge or modify any substantive right" (quoting 28 U.S.C. § 2072(b))).

Nor is there any reason to conclude that collective legal action is any more a "core" part of the NLRA than it is a "core" part of any other statute:

The focus of the NLRA is organizing and collective bargaining, not litigation.

Both Congress and this Court regard Section 7 as a means to the end of better wages and working conditions (*i.e*, procedural), not as an end in itself (*i.e.*, substantive). When it enacted the NLRA, Congress explained that the purpose of the Act was to "encourag[e] * * * collective bargaining" and "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151.

And this Court likewise recognized that these rights "are protected *not for their own sake* but as an instrument of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975) (emphasis added) (quoting 29 U.S.C. § 151). The Court accordingly drew a distinction between "employees' *substantive* right to be free of racial discrimination" and "the *procedures* available under the NLRA for securing these rights." *Id.* at 69 (emphases added).

In short, insofar as anything turns on whether the right to engage in "other concerted activities" is procedural or substantive, both the statute and this Court treat it as procedural.

Second, Congress in the NLRA did not create a "right" to participate in class actions.

We have already explained that the plain language of Section 7 does not unambiguously encom-

pass class actions. See pages 11-12, *supra*. That should be the end of the inquiry. A federal agency may not supersede the clear command of one statute enacted by Congress (here, the FAA) based on the agency's construction of what is at best ambiguous language in a second statute (the NLRA). Only Congress has the power to make that determination.

If the Court decides that even an ambiguous statute can displace an unambiguous one, then the Court should determine Section 7's meaning for itself, without deferring to the NLRB. There is no basis for concluding that Congress would delegate such a decision to a federal agency. Cf. *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). The best reading of the statutory text is that Section 7 does not guarantee a right to class actions.

Third, even if Section 7 could be read to create a right to participate in class actions, it does not follow that an agreement that requires bilateral arbitration prevents the effective vindication of employees' Section 7 rights.

The "effective vindication" exception has never been read to require that every twig in a bundle of rights remain impregnable. Indeed, the Justices who dissented in *Italian Colors* recognized that the agreement involved in that case "could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism" for coordination among claimants. 133 S. Ct. at 2318 (Kagan, J., dissenting). That is manifestly the case with employment arbitration.

Employees who sign agreements to arbitrate on an individual basis can still engage in myriad forms of concerted activity, including forming unions if

their workplace is not already unionized, raising grievances through their unions (or collectively in the absence of a union), striking, picketing, and collective bargaining.

And even within the realm of bilateral arbitration, employees are left free to communicate with co-workers about workplace problems, to encourage their co-workers to bring claims, to testify in each other's cases, to jointly retain the same counsel and expert witnesses, to share evidence, and to pool resources to fund litigation. Indeed, this kind of coordinated arbitration strategy should be easier in the employment context than elsewhere, because a group of employees with similar claims will be easier to identify and communicate with than a comparable group of consumers.

In short, the *only* thing restricted by agreements to arbitrate on an individual basis is employees' ability to litigate their claims collectively. Removing that one twig from the bundle does not prevent employees from vindicating their right under Section 7 to engage in "concerted activities" for their "mutual aid or protection."

Finally, if there truly is an irreconcilable conflict between the FAA and the NLRA (as interpreted by the Board), that does not mean that the FAA should give way.

The Court was presented with precisely that scenario in *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31 (1942). There, the owner of a vessel discharged several crew members who had engaged in a strike while aboard ship. The Board determined that in so doing the employer had violated various provisions of

the NLRA. The Board accordingly ordered the employees' reinstatement (among other remedies).

This Court agreed that ordinarily the Board's order would have been within its authority, but continued that "there is more to this case"—namely, that "[t]he strike was conducted by seamen on board a vessel and away from home port." 316 U.S. at 38. That rendered the strike an act of mutiny in violation of federal law. *Id.* at 38-46. In such circumstances, the Court explained, "the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Id.* at 47. Because there were other ways that the employees and the union could have sought redress under the NLRA besides engaging in a strike that amounted to mutiny, the Court overturned the Board's order. *Id.* at 47-49.

So too here. As noted above, employees may engage in a wide range of "concerted activities" "for the purposes" of "mutual aid or protection" other than participating in a class or collective action. Hence, the "careful accommodation of one statutory scheme to another" called for by *Southern Steamship* requires that the Board's interpretation of the NLRA, not the FAA, give way.

C. The *D.R. Horton* Rule Is Not Authorized By Section 2's Savings Clause.

The FAA itself contains an exception to its enforceability mandate, stating that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. This "savings clause" exception, too, is inapplicable here.

Like the "congressional command" and "effective vindication" exceptions, the savings clause is narrow. It allows "agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (quoting *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)); see *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law applies only "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally").

Moreover, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343.

The Court accordingly has held that an ostensibly neutral rule of California law that prohibited class-action waivers in any consumer agreement of adhesion did not fall within the savings clause because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

The Board nonetheless places principal reliance on the savings clause in its defense of the *D.R. Horton* rule. Indeed, the Board's question presented focuses exclusively on the savings clause. The Seventh Circuit in No. 16-285 and the Ninth Circuit in No.

16-300 likewise relied solely on the savings clause in upholding the *D.R. Horton* rule.

That approach is curious for several reasons.

To begin with, *none* of this Court's previous decisions addressing the interplay between the FAA and another federal statute has even mentioned the savings clause. Rather, the Court describes the savings clause as "the touchstone" for determining when "state law" is applicable—and not preempted by the federal-law enforceability command set forth in the first clause of Section 2. *Perry*, 482 U.S. at 492 n.9.

"Saving clauses save state laws from preemption; they don't save other federal statutes enacted by the same sovereign." *Alternative Entm't*, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part) (citation omitted); accord, No. 16-300 Pet. App. 39a (Ikuta, J, dissenting).

Moreover, invoking the savings clause in this context carries the risk of diluting and circumventing the "contrary congressional command" test, which rests on the general principles that this Court applies in addressing claims that two federal statutes conflict. See pages 18-19, *supra*.

For these reasons, it is highly questionable whether the savings clause even applies when the other federal statute—here, the NLRA—is not sufficiently clear to satisfy the "congressional command" exception.

But even if it were theoretically possible for the savings clause to apply when the ostensibly neutral rule derives from a federal statute that does not itself clearly override the FAA, this Court's case law

establishes that the savings clause does not apply to rules directed at class-action waivers.

1. *Concepcion* establishes that the *D.R. Horton* rule does not fall within the savings clause.

The argument that the *D.R. Horton* rule falls within the savings clause rests on the following syllogism: (a) under the savings clause, arbitration agreements can be invalidated based on "such grounds as exist at law or in equity for the revocation of any contract"; (b) illegality is a generally applicable ground for invalidating contracts; (c) the NLRA (according to the Board) makes all agreements to resolve disputes on an individual basis illegal, because such agreements infringe upon employees' Section 7 right to engage in "concerted activity"; and therefore, (d) the NLRA's prohibition is covered by the savings clause. See No. 16-307 Pet. 13-14; No. 16-285 Pet. App. 14a-15a; No. 16-300 Pet. App. 17a.

As Judge Sutton recently explained, however, that line of reasoning "is a repackaging of arguments *Concepcion* already rejected." *Alternative Entm't*, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part).

Concepcion addressed California's *Discover Bank* rule, under which class waivers in consumer contracts of adhesion—whether arbitration agreements or other contracts—were deemed to be unenforceable as illegal exculpatory clauses. See *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005). The respondents in *Concepcion* argued that Section 2's savings clause "expressly preserves state-law contract principles that do not discriminate against arbitration"; that "the principle that class action waiv-

ers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally"; and that "[t]he approach courts have taken to class-action bans in nonarbitration agreements * * * demonstrates that the California Supreme Court and other courts that have reached the same conclusion are concerned with aggregation, not arbitration." Resp. Br. at 13, 21, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011) (No. 09-893), 2010 WL 4411292, at *13, *21 (quoting *Discover Bank*, 113 P.3d at 1112).

That is the exact same syllogism that the Board invokes here—and this Court flatly rejected it. The Court explained that "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 563 U.S. at 343. Observing that "[t]he overarching purpose of the FAA, evident in the text of [9 U.S.C.] §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; see also *Italian Colors*, 133 S. Ct. at 2312 (in *Concepcion*, "we invalidated a law conditioning enforcement of arbitration on the availability of class procedure").

As Judge Sutton recently explained, "[s]ubstitute 'illegality' for 'unconscionability[]' [in *Concepcion*] and you have the Board's argument * * *. That did not work there. It should not work here." *Alternative*

Entm't, 2017 WL 2297620, at *18 (Sutton, J., concurring in part and dissenting in part). Because the *D.R. Horton* rule conditions enforcement of employment arbitration agreements on the availability of class procedures, it falls outside the savings clause for the same reason as the *Discover Bank* rule did.

2. The Board's efforts to distinguish *Concepcion* miss the mark.

The Board and the Seventh and Ninth Circuits attempt to distinguish *Concepcion* on various grounds, but none withstands scrutiny.

First, they argue that Section 7's protection of concerted activity does not "discriminate" against arbitration. That argument was made and rejected in *Concepcion*. The respondents in that case asserted that "[t]he state does not treat arbitration agreements in a manner different from that in which it otherwise construes nonarbitration agreements" and that "California's unconscionability doctrine incorporates the venerable prohibition on exculpatory clauses," which is "applicable to all contracts and codified in California's law since 1872." Resp. Br. at 18, 19, *Concepcion*, 2010 WL 4411292, at *18, *19 (quotation marks omitted).

This Court held that *facial* neutrality is insufficient, explaining that if a generally applicable contract defense is "applied in a fashion that disfavors arbitration" or otherwise "stand[s] as an obstacle to the accomplishment of the FAA's objectives," it falls outside the savings clause. *Concepcion*, 563 U.S. at 341, 343. Thus, as the California Supreme Court observed in holding that the *D.R. Horton* rule cannot be reconciled with the FAA, "*Concepcion* makes clear that even if a rule against class waivers applies

equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 327 P.3d at 141.

Second, the Board and the Seventh and Ninth Circuits have argued that the *D.R. Horton* rule does not run aground on *Concepcion* because it leaves employers free to insist on bilateral arbitration so long as class procedures are available to employees in court. But the *Concepcion* respondents, too, pointed out that "California law is neutral as to whether classwide proceedings take place in arbitration or in court." Resp. Br. at 54, *Concepcion*, 2010 WL 4411292, at *54.

This Court held, however, that such a hybrid approach is precluded by the FAA because it would undermine the objectives of arbitration. Although consumers would "remain free to bring and resolve their disputes on a bilateral basis," there would be "little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Concepcion*, 563 U.S. at 347. Moreover, "faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." *Ibid.* That is as true in the employment context as it is in the consumer context. Whether by rules of the arbitration forum or by contract, virtually all employers wind up subsidizing employment arbitration by paying the lion's share of the fees.[5] That

[5] Epic Systems's and Murphy Oil's arbitration provisions require them to pay all arbitration costs other than the filing fee. No. 16-285 Pet. App. 33a; No. 16-307 J.A. 9. And while Ernst &

is economically justifiable if they receive in return the assurance that all claims will be arbitrated on an individual basis. But if they must confront class actions, there is no incentive to subsidize arbitration of individualized claims—claims that might not be brought at all if arbitration were unavailable.

Third, the Board and the Seventh and Ninth Circuits argue that *Concepcion* is distinguishable because it involved a state-law rule, whereas here the *D.R. Horton* rule rests on the Board's interpretation of a federal statute (the NLRA).

But assuming for present purposes that the savings clause applies at all to federal-law grounds for invalidating a contract, there certainly is no basis for going further and assuming that it gives *preferential* treatment to such federal-law grounds. To be sure, this Court held in *Concepcion* that "nothing in [Section 2's savings clause] suggests an intent to preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at

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Young's arbitration provision requires costs to be shared equally "to the extent permitted by law and the [arbitration provider's] Arbitration Rules" (No. 16-300 J.A. 45), the provision also allows employees to choose from among three arbitration providers (*id.* at 41), two of which—the AAA and JAMS—require the employer to pay virtually all costs of the arbitration. See Am. Arbitration Ass'n, Employment Arbitration Rules and Mediation Procedures 33 (Nov. 1, 2009) ("AAA Rules"), https://www.adr.org/employment (limiting employee costs to $200); JAMS, JAMS Employment Arbitration Rules & Procedures (2014), https://www.jamsadr.com/rules-employment-arbitration/ (specifying that when arbitration agreement is a condition of employment, the employee pays only the initial case management fee). Thus, as a practical matter Ernst & Young will wind up subsidizing arbitration just as if it agreed to do so in its arbitration provision.

343 (emphasis added). But it made clear in *Italian Colors* that the same principle applies to federal-law rules, explaining: "Truth to tell, our decision in [*Concepcion*] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration.'" 133 S. Ct. at 2312 (alteration in original) (quoting *Concepcion*, 563 U.S. at 344).

Most importantly, if the Board were correct that the savings clause covers the *D.R. Horton* rule, a state statute purporting to guarantee individuals the right to "concerted action" would also fall within the savings clause. Yet that is exactly what California courts attempted to do in *Discover Bank*—and what *Concepcion* held the FAA forbids. Accordingly, "in light of *Concepcion*," such a reading of the NLRA "is not covered by the FAA's savings clause." *Iskanian*, 327 P.3d at 141.

That the *D.R. Horton* rule is the creation of a federal agency *is* relevant, but not to the savings clause. Rather, it brings into play the question whether, in enacting the NLRA, Congress displaced the FAA. As we have explained (see pages 6-16, *supra*), there is no credible argument that Congress did so.

* * *

In sum, none of the three exceptions to the FAA's enforceability mandate is applicable here. The Board's *D.R. Horton* rule must therefore be invalidated, and the arbitration agreements in these cases enforced according to their terms.

II. BILATERAL ARBITRATION IS BENEFICIAL TO EMPLOYERS AND EMPLOYEES ALIKE

The Court's decision in this case turns upon statutory text, not policy arguments. But opponents of arbitration consistently assert that arbitration disadvantages employees. These policy arguments provide no basis for disregarding Congress's decision to codify in law a federal policy favoring arbitration. But they are also wrong: Bilateral arbitration provides significant benefits to employers *and* employees alike.

For many employees with individualized complaints against their employer—whether involving wrongful discharge, unlawful discrimination, or other grievances—arbitration is the *only* viable means of recovery, because the employees' claims are too small to justify the expense of court litigation or to attract a contingency-fee lawyer.

This Court has recognized that "[a]rbitration agreements allow parties to avoid the costs of litigation, *a benefit that may be of particular importance in employment litigation*, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001) (emphasis added); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) ("[A]rbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation.").

Empirical analyses bear out this Court's assessment. A leading study of employment arbitration in 2003 concluded that employees whose income or legal claim was less than $60,000 would not be able

to afford litigation but would be able to proceed in arbitration. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (May-July 2003).[6] A small claim is more viable in arbitration because costs in arbitration are lower—and because in an arbitral forum, "it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 15 (2017).

In short, the empirical evidence shows that "a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist." *Id.* at 16.

Moreover, the arbitral forum is just as fair to employees as litigation in court. As one commentator explains, "most employment arbitration cases are today conducted under rules like those of the American Arbitration Association, which mandate a fair procedure." Laura J. Cooper, *Employment Arbitration 2011: A Realist's View*, 87 Ind. L.J. 317, 320 (2012).[7]

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[6] The figure is likely higher today: $60,000 in 2003 equates to nearly $80,000 in 2017. See Bureau of Labor Statistics, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl.

[7] Arbitration agreements that include unfair procedural rules, or unfair processes for selecting arbitrators, are subject to invalidation under generally applicable unconscionability principles. *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-534 (2012); see also, *e.g.*, *Chavarria* v. *Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (provision requiring employee

Specifically, the AAA's employment-arbitration rules (1) cap an employee's filing fee in a case against an employer at $200 and require the employer to pay the other costs and expenses of arbitration; (2) provide that arbitrators must be mutually acceptable to both parties; (3) require arbitrators to disclose any circumstance that might raise doubt about their impartiality; and (4) ensure both sides "discovery * * * necessary to a full and fair exploration of the issues in dispute." See generally AAA Rules.

As a consequence, "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true." David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (2005); see also, *e.g.*, St. Antoine, *supra*, at 16 (endorsing this conclusion).

For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* (comparing median awards).

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to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Alexander* v. *Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (provision barring punitive damages).

Because of both its informality and its efficiency, arbitration is also less contentious than litigation, enabling employees to resolve disputes with less risk of permanently damaging their relationships with their employers and coworkers. And because one of the hallmarks of employment arbitration is confidentiality, this alternative-dispute-resolution mechanism reduces the risk that potentially embarrassing information about an employee will become public—including even the very fact that the employee pursued a claim against the employer, which may benefit the employee if he or she applies for a job at another employer in the future.

If the Board's arguments were accepted and the *D.R. Horton* rule upheld, all the benefits of bilateral arbitration would be lost. Employees, employers, and the national economy would all be worse off; and the many employment disputes that are routinely and effectively arbitrated every day would be diverted to an already-clogged court system—the very scenario that the FAA was designed to prevent.

CONCLUSION

The judgment of the court of appeals in No. 16-307 should be affirmed. The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be reversed.

Respectfully submitted.

KATE COMERFORD TODD
WARREN POSTMAN
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062
(202) 463-5337

ANDREW J. PINCUS
Counsel of Record
EVAN M. TAGER
ARCHIS A. PARASHARAMI
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

JUNE 2017

RECORD AND BRIEFS

FILED
AUG 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-285, 16-300, & 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner,*
v.
JACOB LEWIS, *Respondent.*

ERNST & YOUNG LLP, ET AL., *Petitioners,*
v.
STEPHEN MORRIS, ET AL., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
v.
MURPHY OIL USA, INC., ET AL., *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS JACOB LEWIS AND STEPHEN MORRIS AND PETITIONER NATIONAL LABOR RELATIONS BOARD

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org
Counsel for Amicus Curiae
*Counsel of Record

August 16, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It further makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise" of those rights. *Id.* § 158(a). Notwithstanding those guarantees under federal law,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

the employers in these cases required their employees and job applicants to sign, as conditions of employment, binding arbitration agreements waiving their right to participate in any joint, class, or collective action against their employer relating to employment issues. Ernst & Young Br. 7-8 [hereinafter E&Y Br.]; Epic Br. 6-7; U.S. Br. 6. Thus, when the plaintiffs in these cases tried to vindicate their rights under federal law by jointly filing class and collective actions in court, their employers moved to dismiss their actions and compel individual arbitration of their claims.

According to these employers, they may force their employees to participate in individual arbitration—despite the NLRA's guarantee that employees may "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157—because, in part, the NLRA's guarantee that employees may engage in "other concerted activities" does not encompass class, collective, or other group legal actions. As they explain it, because "the NLRA was enacted before Rule 23 and the [Federal Labor Standards Act (FLSA)], neither of which existed until 1938," "Congress could not have intended 'concerted activities' to include class actions under Rule 23 or collective actions under the FLSA." Epic Br. 32; *see* E&Y Br. 42 ("there is no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures . . . especially because the procedures at issue in cases such as this one did not exist at the time the NLRA was enacted"). This is wrong.

While Rule 23 and the FLSA did not exist when the NLRA was drafted, "modern class actions are part of a much longer tradition of . . . group litiga-

tion." Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 3 (1987) [hereinafter Yeazell, *From Medieval Group Litigation*]. Indeed, class actions "trace their origins . . . to the unwritten practices of English Chancery," Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 517-18 (1974), and they continued to exist in one fashion or another through the succeeding centuries.

In the United States, the practice of group litigation was formalized as early as 1843 with the adoption of the Federal Rules of Equity, which provided for group litigation "[w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it." Fed. Equity R. 48, 42 U.S. lvi (1842) (repealed 1912). Although Federal Equity Rule 48 provided that absent parties would not be bound by decrees entered through group litigation, that aspect of the rule was often ignored by the courts, George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DePaul L. Rev. 73, 78 (1984), and was eliminated altogether when the rule was simplified in 1912, with the adoption of Rule 38.

Under Federal Equity Rule 38, courts could permit "one or more [to] sue or defend for the whole" when "the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." Fed. Equity R. 38 (1912) (repealed 1938), *in The New Federal Equity Rules Promulgated by the United States Supreme Court at the October Term, 1912*, at 203 (James Love Hopkins ed., 1918) [hereinafter *The New Federal Equity Rules*]. While the new rule left unresolved many questions, both

conceptual and practical, about how group litigation should be prosecuted in federal court, it left no doubt that group litigation would continue. Thus, by the time the NLRA was enacted in 1935, group litigation in various forms was well established in the federal courts. Indeed, roughly 15 years before the NLRA was adopted, this Court observed that "[c]lass suits have long been recognized in federal jurisprudence. . . . The subject is provided for by rule 38 . . . of the equity rules of this court promulgated in 1912." *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921).

Against this background, the NLRA broadly guaranteed that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. By casting the law's guarantee in these broad terms, its drafters ensured that it would protect all manner of "concerted activities" in which workers engage for their "mutual aid or protection," without regard to the particular form those "concerted activities" would take. The activities protected by the NLRA therefore include employees' efforts to bring representative actions under Rule 23 and the FLSA, both of which evolved out of the same tradition of group litigation that was already long established when the NLRA was enacted. Indeed, when Rule 23 was adopted, it was explicitly deemed a "substantial restatement" of Equity Rule 38. Fed. R. Civ. P. 23, 1937 advisory committee note. And when the FLSA was first enacted in 1938, it explicitly allowed "one or more employees for and in behalf of himself or themselves and other employees similarly situated" to bring an action against an employer who violated the law, as well as for "such employee or employees [to] designate an agent or representative to

maintain such action for and in behalf of all employees similarly situated." Pub. L. No. 75-718, 52 Stat. 1060, 1069 (1938) (codified as amended at 29 U.S.C. §§ 201-219). Thus, the NLRA's broad protection of "concerted activities" should not exclude Rule 23 class actions and FLSA collective actions simply because group litigation in those specific forms was not yet around when the NLRA was adopted. Both are "concerted activities" in which employees can engage for their "mutual aid and protection," and as such they are protected by the NLRA.

ARGUMENT

THE TERM "CONCERTED ACTIVITIES" IN THE NLRA ENCOMPASSES EMPLOYEES' EFFORTS TO BRING RULE 23 CLASS ACTIONS AND FLSA COLLECTIVE ACTIONS.

When the NLRA was enacted in 1935, it provided that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. According to the employers in these cases, the NLRA's guarantee that employees may "engage in other concerted activities" cannot encompass Rule 23 class actions or FLSA collective actions because "the NLRA was enacted before Rule 23 and the FLSA, neither of which existed until 1938." Epic Br. 32; *see* E&Y Br. 42. This is wrong.

While Rule 23 and the FLSA postdate the NLRA, group litigation does not. To the contrary, as the Seventh Circuit recognized, group litigation has a rich history dating back to the twelfth century. *See* Epic Pet. App. 8a ("Rule 23 may have been yet to

come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court . . . ."). The Rule 23 class action and the FLSA collective action both developed out of that rich tradition. Thus, the fact that the NLRA was enacted prior to Rule 23 and the FLSA is entirely beside the point. The NLRA broadly guarantees employees the right to engage in "concerted activities," and in so doing, it protects employees' efforts to bring Rule 23 class actions and FLSA collective actions no less than it protected employees' efforts to engage in the forms of group litigation that existed when the NLRA was adopted.

I. GROUP LITIGATION, INCLUDING THE PRECURSOR TO RULE 23, LONG PREDATES THE ADOPTION OF THE NLRA.

While the parameters of the modern class action are defined by Federal Rule of Civil Procedure 23, the adoption of that rule was hardly the beginning of litigation in which many individuals come together to pursue common claims. As this Court has noted, "representative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (citing Yeazell, *From Medieval Group Litigation*, *supra*, and Marcin, *supra*); *see* Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 687 (1997) [hereinafter Yeazell, *Past and Future*] ("group litigation has a remarkably deep history"). Indeed, group litigation dates back to the twelfth century, when "a writ of Henry III took to task the archbishop of Canterbury" after he "had received a complaint from some of his tenants that the archbishop had refused them the right of" litigating as a group. Yeazell, *Past and Fu-*

ture, *supra*, at 689-90. "The writ commanded the archbishop to recognize this widespread custom in his own courts: 'according to our law and custom of the realm . . . villages and communities of villeins . . . ought to be able to prosecute their pleas and complaints in our courts and in those of others through three or four of their number." *Id* at 690.

While its shape and form continued to evolve over the ensuing centuries, group litigation became established in the United States no later than the early nineteenth century, when Justice Joseph Story recognized that there are exceptions to the general rule that "all persons, materially interested in the subject of the suit, however numerous, ought to be parties." *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820). As he explained, "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole," "in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree." *Id. But see id.* at 723 (explaining that the court "will withhold its interposition" if the decree cannot "be fitly made, without substantial injury to third parties").

This view of group litigation was codified when the Federal Rules of Equity were adopted in 1843. Rule 48 provided that "[w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the

plaintiffs and the defendants in the suit properly before it." Fed. Equity R. 48. While Rule 48 provided that "in such cases the decree shall be without prejudice to the rights and claims of all the absent parties," *id.*, "that provision of Rule 48 . . . was largely ignored by the courts," Strickler, *supra*, at 78, at least in certain kinds of class actions, Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1849 (1998) ("in the eighteenth and early nineteenth centuries, English and American decisions oscillated between saying that absent members of a class were bound by a decree and that they were not. The same pattern of equivocation persisted over the next century"); *id.* at 1920-21 (discussing a treatise writer who identified two types of class suits and suggested that decrees were only binding in one type).

In *Smith v. Swormstedt*, for example, this Court held that "[t]he rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others." 57 U.S. (16 How.) 288, 302 (1853). As this Court further explained, "a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Id.* at 303. And in *United States v. Old Settlers*, three individuals sued on behalf of "the 'Old Settlers,' or 'Western Cherokee,' Indians." 148 U.S. 427, 427 (1893). This Court rejected the "suggestion that these so-called 'commissioners' do not bring themselves as strictly within the rule upon this subject as they should," concluding that "they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment." *Id.* at 480.

When the Federal Rules of Equity were revised in 1912, and Rule 48 was replaced by Rule 38, the provisions for class actions were simplified: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Fed. Equity R. 38. Significantly, "on the recommendation of the Bar Committee of the Circuit Court of Appeals of the Second Circuit," the "last sentence of the former Rule 48"—the one providing that absent class members would not be bound by the decree—was omitted "'for the reason that in every true 'class suit' the decree is necessarily binding upon all parties included in the decree.'" *The New Federal Equity Rules*, *supra*, at 169 (citing *Coann v. Atlanta Factory Co.*, 14 Fed. Rep. 4 (C.C.N.D. Ga. 1882); *Am. Steel Co. v. Wire Drawers' Union*, 90 Fed. Rep. 598 (C.C.N.D. Ohio 1898)); *see Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) ("The omission from old Rule 48 amended and promulgated as Rule 38 . . . of the phrase . . . 'the decree shall be without prejudice to the rights and claims of all absent parties' preserved unimpaired the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court.").

Following the adoption of Rule 38, courts invoked the rule to hear claims brought by plaintiffs on behalf of themselves and others similarly situated. In *Little v. Tanner*, for example, "retail merchants residing in the city of Spokane" sued to "restrain the Attorney General of the state, the prosecuting attorney of Spokane county, and the county treasurer of Spokane county from enforcing the provisions of [a particular state law] as against the plaintiffs and all other per-

sons similarly situated." 208 F. 605, 607 (E.D. Wash. 1913), *rev'd on other grounds*, 240 U.S. 369 (1916). Rejecting the argument that the "several plaintiffs may not join in the same suit," the court quoted Rule 38 and stated that "[t]his case would seem to fall within the spirit and equity of that rule." *Id.* at 608; *see Tanner v. Little*, 240 U.S. 369, 374 (1916) ("The court ruled against the motions to dismiss, and, concurring with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants, we pass to the consideration of the validity of the statute of the state."); *see also Merchants' & Mfrs.' Traffic Ass'n v. United States*, 231 F. 292, 294-95 (N.D. Cal. 1915) (noting the "well-known rule that bills may be filed in the name of an unincorporated association, and by parties on behalf of others similarly situated" and citing, among other things, Rule 38); *Chew v. First Presbyterian Church*, 237 F. 219, 241 (D. Del. 1916) ("[t]he right of the complainants to sue on behalf of themselves and others is supported by equity rule 38"); *Gramling v. Maxwell*, 52 F.2d 256, 260 (W.D.N.C. 1931) ("It is a class suit instituted in behalf of a large number of peach growers affected by the statute . . . . [S]ince the adoption of the 38th Equity Rule, the right to maintain such a suit cannot be denied." (internal citation omitted)).

Perhaps most significantly, in *Supreme Tribe of Ben Hur v. Cauble*, this Court invoked Rule 38 in a case in which a fraternal benefit association sought to enjoin certain individuals from "prosecuting in the state courts certain suits which, it is averred, would relitigate questions settled by a decree" of the federal court on the theory that they were "bounded and concluded by the federal decree." 255 U.S. at 357. As this Court explained, "[c]lass suits have long been recognized in federal jurisprudence. . . . The subject is

provided for by rule 38 . . . of the equity rules of this court promulgated in 1912." *Id.* at 363; *see id.* at 366 ("class suits were known before the adoption of our judicial system, and were in use in English chancery"). This Court also highlighted as "significant" the "omission of the [Rule 48] qualifying clause" when Rule 38 was drafted, *id.*, concluding in the case before it that "the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit" and "[b]eing thus represented, we think it must necessarily follow that their rights were concluded by the original decree." *Id.*

Moreover, this long history of group litigation includes cases in which employees have sued their employers for allegedly violating the law. In *Gorley v. City of Louisville*, for example, "James T. Gorley and nine other plaintiffs" sued the city of Louisville "for the benefit of themselves and the other members of the police force" of which they were a part after they were "suspended and laid off without pay" for several days each month. 65 S.W. 844, 844-45 (Ky. 1901); *see id.* at 847 ("[t]he right of the plaintiffs to bring and prosecute this suit for their benefit, and for the others for whom they sue, seems to be conclusively settled"). And in *Grand International Brotherhood of Locomotive Engineers v. Mills*, the Arizona Supreme Court considered whether employees who believed they had been denied certain seniority rights to which they were entitled were bound by the results of prior litigation on that topic. 31 P.2d 971, 982 (Ariz. 1934) ("It is the contention of defendants that [prior] suits were what is known as class actions, and that the judgments on them are binding upon the plaintiffs in the present suits."). The court concluded that the plaintiffs were bound because "in the absence of fraud

and collusion on the part of the plaintiffs representing a certain class in a suit, all of the members of that class are bound by the judgment rendered therein." *Id.* at 984-85.

Thus, although the prevalence of group litigation in the United States has varied over time, such litigation nonetheless had a long pedigree in this country by the time the NLRA was adopted in 1935. As the next section shows, the NLRA's protections encompass employee efforts to bring the forms of group litigation that exist today, including Rule 23 class actions and FLSA collective actions, no less than it protected employee efforts to bring the forms of group litigation that existed at the time of its adoption.

II. THE NLRA'S BROAD TERM "CONCERTED ACTIVITIES" ENCOMPASSES EMPLOYEES' EFFORTS TO BRING THE TYPES OF GROUP LITIGATION LATER CODIFIED IN RULE 23 AND THE FLSA.

When the NLRA was enacted in 1935, it broadly guaranteed that "[e]mployees shall have the right to . . . engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. As this Court has explained, "[t]he 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex, Inc. v. Nat'l Labor Relations Bd.*, 437 U.S. 556, 565 (1978). Recognizing this, Congress chose, "as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" *Id.* The drafters of the NLRA intended that this language be interpreted expansively: in discussing an earlier ver-

sion of the bill with the same language, Senator Wagner cautioned that the bill's specific references to a "few of the practices which have proved the most fertile sources for evading or obstructing the purpose of the law" should not be viewed as "in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom." *Hearings on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 13 (1935), *in* 2 *Legislative History of the National Labor Relations Act, 1935*, at 2487 (1949); *see Nat'l Labor Relations Bd. v. City Disposal Sys.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit this protection [allowing employees to band together in confronting an employer regarding the terms and conditions of their employment] to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *see also* Lewis Br. 19-25 (discussing legislative history of the NLRA); Morris Br. 20-23 (same).

Given that the NLRA broadly protects "concerted activities," its protections encompass employees' efforts to bring Rule 23 class actions and FLSA collective actions no less than it protected employees' efforts to bring the forms of group litigation that existed when it was adopted in 1935, including simple joinder (which the employers' agreements in these cases also ban). This is particularly true because the Rule 23 class action and the FLSA collective action both developed out of the same tradition of group litigation that existed when the NLRA was adopted.

Federal Rule of Civil Procedure 23 currently provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members" if certain conditions are satisfied. Fed. R. Civ. P. 23(a). When Rule 23 was first promulgated in

1938, its drafters recognized that it was simply the latest reformulation of the centuries-old equity doctrines that permitted group litigation. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 307 (1937-1938) ("This constantly growing utilization of a two hundred and fifty year old doctrine has prompted legislative and judicial reformulation. The latest reformulation is to be found in Rule 23 of the Proposed Rules of Civil Procedure . . . ."); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C.L. Rev. 323, 329 (2005) ("The rule carried forward equity notions of necessary joinder of parties that were recognized by the Supreme Court back in the 1800s."). Indeed, the Advisory Committee Notes explicitly identified Rule 23 as "a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed." Fed. R. Civ. P. 23, 1937 advisory committee note; *see Ortiz*, 527 U.S. at 832 (noting that "class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits" (internal citation omitted)).

As the Advisory Committee Notes further explained, Rule 23 "adopts the test of [former] Equity Rule 38," namely that "the question should be 'one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,'" Fed. R. Civ. P. 23, 1937 advisory committee note; *see id.* (noting that the test is a "common test"). It also defined what constitutes a "'common or general interest.'" *Id.* Moreover, because "[c]ourts experienced significant difficulties in determining the binding effect of a judgment entered under Equity Rule 38," the new

rule attempted to classify the various types of class actions in a way that would make clear when judgments would bind absent class members. Rabiej, *supra*, at 330. To be sure, Rule 23 has evolved substantially since it was first promulgated in 1938, but nothing in its subsequent amendments makes it any less a type of "concerted activit[y]" than were the various types of group litigation that existed when the NLRA was adopted.

Like Rule 23, the FLSA provides for representative actions, specifically allowing for "any one or more employees" to bring "[a]n action to recover the liability prescribed [earlier in the statute] against any employer . . . in any Federal or State court of competent jurisdiction" "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); *see* James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 Ill. L. Rev. 119, 123 (1942-43) ("it is clear from the language of section 16(b) that Congress intended to avoid multiplicity of suits and joinder difficulties by permitting a speedy and efficient determination of employee rights in some group form of action").[2]

In providing that one employee can sue on behalf of those "similarly situated," the drafters of the FLSA borrowed language that was already in use by the

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[2] While the FLSA's provision that employees may "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated," 52 Stat. at 1069, was removed from the law in 1947, the provision that an employee can sue on "behalf of himself or themselves and other employees similarly situated" was left untouched. Portal to Portal Act of 1947, Pub. L. No. 80-49, § 5, 61 Stat. 84, 87 (1947) (codified at 29 U.S.C. §§ 251-262).

federal courts hearing class claims in equity. *See, e.g.*, *Carpenter v. Knollwood Cemetery*, 198 F. 297, 298 (D. Mass. 1912) ("[t]he bill alleges that this suit is brought by the complainants in behalf of themselves and all other owners of landholders' shares who are similarly situated"); *Risley v. City of Utica*, 168 F. 737 (C.C.N.D.N.Y. 1909) ("The complainant here sues in behalf of himself and all others similarly situated."); *see also* Rahl, *supra*, at 128 ("When Congress stated that action may be brought for 'employees similarly situated' it employed the very words which give rise to an ordinary class suit when they are contained in the plaintiff's pleadings."). Thus, Rule 23 class actions and FLSA collective actions both derive from the rich tradition of group litigation that existed long before the NLRA was enacted in 1935.

In sum, while Rule 23 and the FLSA did not exist in 1935, group litigation very much did. And the NLRA did not limit its protection to the precise forms of group litigation that existed at the time the law was enacted. Rather, it broadly guaranteed employees the right to engage in all "concerted activities, for the purpose of collective bargaining or other mutual aid or protection," without regard to the particular form those "concerted activities" would take. Rule 23 class actions and FLSA collective actions fall within that broad guarantee no less than the equitable forms of group litigation that existed at the time the NLRA was adopted.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be affirmed, and the judgment of the court of appeals in No. 16-307 should be reversed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
BRIAN R. FRAZELLE
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

August 16, 2017

*Counsel of Record

RECORD
AND
BRIEFS

Nos. 16-285, 16-300, 16-307

IN THE
Supreme Court of the United States

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,
v.
STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF COUNCIL ON LABOR LAW EQUALITY, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF EMPLOYERS

RON CHAPMAN, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
8117 Preston Road, Ste. 500
Dallas, TX 75225
(214) 987-3800
ron.chapman@odnss.com

BRIAN E. HAYES
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1909 K Street, N.W., Ste. 1000
Washington, D.C. 20006
(202) 263-0261
brian.hayes@odnss.com

CHRISTOPHER C. MURRAY
Counsel of Record
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46260
(317) 916-1300
christopher.murray@odnss.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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BRIEF OF COUNCIL ON LABOR LAW EQUALITY, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF EMPLOYERS

INTERESTS OF THE *AMICI CURIAE*[1]

Amici represent the interests of thousands of members who use individual arbitration for efficient and cost-effective resolution of legal disputes.

The Council on Labor Law Equality ("COLLE"), a national association of employers, comments on the interpretation of the National Labor Relations Act ("NLRA" or "Act"). COLLE represents NLRA-covered employers in virtually every business sector. COLLE monitors the National Labor Relations Board ("NLRB" or "Board") and the courts in their application of the NLRA. Through *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues affecting a broad cross-section of industries.

The National Association of Home Builders ("NAHB") is a Washington, DC-based trade association focused

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office, except the written consent of Petitioner in 16-307 accompanies this brief.

on enhancing the climate for housing and the building industry. NAHB seeks to expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of over 700 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers, and they construct about 80 percent of new homes annually in the United States. NAHB and its members work for expanding the American dream of home ownership and developing housing that creates vibrant and affordable communities. NAHB is a vigilant advocate in the Nation's courts and frequently participates as a party or *amicus curiae* to safeguard the rights of its members.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 states. Founded in 1943, NFIB seeks to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center is a nonprofit, public interest law firm representing small businesses in the nation's courts on issues affecting small businesses. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports annual gross sales of about $500,000. NFIB's membership reflects American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

The Society for Human Resource Management ("SHRM") is the world's largest HR membership

organization devoted to human resource management. Founded in 1948 and representing over 275,000 members in over 160 countries, SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has over 575 affiliated chapters within the United States and subsidiary offices in China, India, and United Arab Emirates.

These cases are of critical importance to *amici*'s members. Litigation is costly, time-consuming, burdensome, and unpredictable. Many of *amici*'s members use or are considering using individual arbitration to resolve legal disputes fairly and efficiently. *Amici*'s members believe individual arbitration benefits all parties to disputes, including those between employers and employees. The outcome of these cases will likely effect the ability of *amici*'s members to use individual arbitration.

SUMMARY OF ARGUMENT

This Court should overrule *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (*"Horton"*), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) (*"Horton II"*) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) (*"Murphy Oil"*), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015) (*"Murphy Oil II"*).[2] Despite

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[2] *Amici*'s counsel Brian Hayes was a Member of the Board but did not participate in *Horton*. Their counsel Ron Chapman, Jr. and Christopher C. Murray successfully represented D.R. Horton before the Fifth Circuit in *Horton II* and other employers challenging *Horton*. *Patterson v. Raymours Furniture Company, Inc.*, 659 Fed. App'x 40 (2d Cir. 2016) (rejecting *Horton*); *Emp'rs Res. v. NLRB*, 2016 U.S. App. LEXIS 19619 (5th Cir. Nov. 1, 2016) (same); *RGIS, LLC v. NLRB*, No. 16-60129 (5th Cir. July 7, 2016)

overwhelming judicial hostility, the Board invokes its policy of nonacquiescence to adhere to those decisions, *Murphy Oil* Pet. App. 22a n.17, and has continued to apply and expand them in over seventy cases.[3] This Court should now reject *Horton*'s reasoning once and for all.

In *Horton*, the Board ruled that the NLRA bars class, collective, and joint action waivers in mandatory arbitration agreements because the NLRA grants covered employees a substantive right to invoke class action, collective action, and joinder procedures ("collective procedures"). *Horton* and its progeny are wrong.

The Board conflates employees' concertedly asserting legal rights with courts' and arbitrators' collectively adjudicating legal claims. The NLRA protects employees from retaliation when they concertedly assert legal rights relating to the terms and conditions of their employment. Federal, state, and local rules of procedure or parties' arbitration agreements govern a decision maker's adjudication of an employee's legal claims. This Court has already held litigants do not

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(per curiam) (same); *see also Hobby Lobby Stores, Inc. v. NLRB*, No. 16-3162 (7th Cir.) (pending).

[3] NLRB GC Mem. 17-02 (3/10/17) at unnumbered pages 28-30 (collecting cases); *see also Countrywide Fin. Corp.*, 362 NLRB No. 165 (Aug. 14, 2015) (employer violated NLRA by moving to compel individual arbitration under arbitration agreement ***silent*** regarding class procedures consistent with *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)); *200 East 81st Rest. Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (July 29, 2015) (every individual employee's filing of an employment-related class or collective action is presumptively "an attempt to initiate, to induce, or to prepare for group action" and concerted activity under *Horton*).

possess a substantive right to specific adjudicatory procedures.

Because the Board cannot require decision makers to exercise their discretion to allow joinder, collective certification, or class certification under standards unrelated to the NLRA, a purported NLRA right to "invoke" collective procedures would be incoherent. Before *Horton*, no authority ever suggested employees might possess such a right under the NLRA, a statute that governs bargaining, not adjudicating.

The Board has no authority to grant employees a substantive right to invoke collective procedures. The NLRA does not delegate to the Board the power to regulate procedures that other decision makers use to adjudicate legal claims under other statutes and law. The Board's interpretation of Federal Rule of Civil Procedure 23 ("Federal Rule 23") as creating procedures to which employees have a substantive right under the NLRA violates the Rules Enabling Act ("REA"), which prohibits using the Federal Rules to enlarge or modify substantive rights.

The Board's interpretation in *Horton* also trenches upon statutes and policies outside the Board's jurisdiction and expertise, including the Federal Arbitration Act ("FAA"), the Federal Rules, the Fair Labor Standards Act ("FLSA"), and other laws addressing adjudication. Invoking collective procedures is not the equivalent of engaging in "concerted legal activity," nor is it inherently concerted. Invoking collective procedures is also connected with a plaintiff's concerns ***as a litigant,*** not his or her concerns as an employee. Finally, the Board has no authority to allocate to employees a substantive right to invoke procedures to increase their power in negotiating litigation settlements.

Although these cases might be decided solely under the FAA, the Court should also hold the NLRA does not provide a substantive right to invoke collective procedures. Not all employees are covered by the FAA. 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). And not all arbitration agreements are covered by the FAA. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008). The enforceability of individual employment arbitration agreements outside the FAA might remain in question unless this Court also rejects the misinterpretation of the NLRA underlying the questions certified. *E.g.*, *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 at 13 (May 18, 2016) (individual arbitration agreements with truck drivers were unenforceable under NLRA because drivers were exempt from the FAA).

ARGUMENT

I. STANDARD OF REVIEW

A. The Board's decisions are not entitled to deference because they interpret law other than the NLRA and unreasonably construe the NLRA.

This Court reviews *de novo* the Board's interpretation of law outside the NLRA. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202-03 (1991). The Court applies *Chevron* in reviewing the NLRB's construction of the NLRA. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996). "First, always, is the question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842–43. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the

precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

When there is no directly expressed Congressional intent on precise questions, the Court does not defer to the Board's interpretations if they are not rational and consistent with the Act. *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 576 (1994). The Board's constructions of the NLRA must be reasonable and permissible. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). Although the Board may balance conflicting interests in formulating national labor policy, *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 499 (1960), courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Courts refuse to defer to the Board's interpretations where they attempt to usurp "major policy decisions properly made by Congress." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). *See also Ins. Agents' Int'l Union*, 361 U.S. at 499 ("[T]he Board's resolution of the issues here amounted . . . to a movement into a new area of regulation which Congress had not committed to it."); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) ("Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'").

Because *Horton* and *Murphy Oil* interpret law other than the NLRA, including the FAA, the Federal Rules, and the FLSA, and provide an unreasonable construction of the NLRA, those decisions are not entitled to deference.

B. In *Murphy Oil*, the Court reviews the Board's reasoning without substituting its own pursuant to *Chenery*.

In reviewing an agency decision, it is "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2710 (2015). Under the *Chenery* doctrine:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. ***If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.***

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (emphasis added).

In *Murphy Oil*, the Board affirmed and adhered to *Horton*. *Murphy Oil* Pet. App. 22a. This Court should review the Board's reasoning articulated in *Horton* and endorsed by *Murphy Oil* without substituting an alternative basis for those decisions. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001). Even if this Court believed the Board reached the right result (which it did not) but for the wrong

reasons, it should refuse to enforce the Board's order. *E.g.*, *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985) ("We express no opinion as to the correct test of 'concerted activities;' we require only that the Board . . . reconsider this matter free from its erroneous conception of the bounds of the law.").

C. In *Lewis* and *Morris*, the courts' conclusion that Section 7 *unambiguously* provides a right to invoke collective procedures conflicts with the Board's decisions.

The Seventh and Ninth Circuits, apparently unpersuaded by *Horton*, disagreed with the Board's reasoning for finding class waivers unenforceable. Unlike the Board, both courts held Section 7 ***unambiguously*** grants employees a right to access collective procedures. *Lewis* Pet. App. 7a; *Morris* Pet. App. 11a.

The courts' finding of non-ambiguity departed significantly from *Horton / Murphy Oil*. The Board construed Section 7 to guarantee employee access to collective procedures as a matter of federal labor policy. *Horton,* 357 NLRB at 2281-82, 2284, 2285-88; *Murphy Oil* Pet. App. 38a-40a, 48a (*Horton* "identif[ied] Federal labor policy and [sought] an accommodation between Federal labor policy and the Federal policy favoring arbitration"), & 66a n.86. In *Horton,* the Board:

- Reviewed Board precedent construing "concerted activities" for "mutual aid or protection" to cover the collective pursuit of workplace grievances, 357 NLRB at 2278-79;
- Applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to hold mandatory individual arbitration agreements function as workplace rules that restrict protected activity, *id.* at 2280;

- Relied on cases finding that certain individual employment agreements interfered with collective bargaining and ordering employers cease and desist enforcement, *id.* at 2280-81;
- Considered whether finding an arbitration agreement unlawful based on the Board's interpretation of the NLRA and the "core principles of Federal labor policy" would conflict with the policies underlying the FAA and, if so, how the Board could undertake a "careful accommodation" of those policies, *id.* at 2284;
- Found, to the extent the FAA conflicts with the NLRA, the FAA was repealed by the Norris–LaGuardia Act ("NLGA"), *id.* at 2288; and
- Concluded *Stolt-Nielsen*, 559 U.S. 662, and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) were not controlling because the Board was not mandating class arbitration but holding an employer could "leave[] open a judicial forum for class and collective claims" to satisfy Section 7, *id.*

The Board adhered to *Horton* in *Murphy Oil*. *Murphy Oil* Pet. App. 31a-74a.

The Seventh Circuit ignored much of *Horton*'s reasoning and instead analyzed Section 7's "text, history, and purpose." *Lewis* Pet. App. 5a. The Seventh Circuit:

- Interpreted Section 7's text using dictionary definitions of "concerted" and "activities" absent from the Board's decisions, *id.*;
- Concluded Section 7's "concerted activity" ***unambiguously*** applies to "collective lawsuits," *id.* at 7a, "the plain language of Section

7 encompasses [collective legal proceedings]," and "Section 7's plain language controls, and protects collective legal processes," *id.* at 9a;

- Concluded the NLRA renders arbitration agreements waiving collective procedures "illegal", *id.* at 14a-15a; and
- Reasoned there is no conflict between the NLRA and the FAA because the FAA's savings clause provides arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and "[i]llegality is one of those grounds." *Id.* at 15a.[4]

The Ninth Circuit similarly held Section 7 was unambiguous and did not defer to *Horton/Murphy Oil*. *Morris* Pet. App. 6a ("The intent of Congress is clear from the statute . . . .").[5]

By departing from the Board's reasoning and finding Section 7 unambiguous, *Lewis* and *Morris* created another split in the law. If *Lewis* and *Morris* were correct (which they were not) that Section 7 ***unambiguously*** provides a right to collective procedures, then the Board's reasoning was wrong, and

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[4] *Lewis* noted if Section 7 were ambiguous, the Court would defer to the Board's reasoning, which it inaccurately characterized as "in accordance with" its own. *Id.* at 7a.

[5] *Lewis* and *Morris* also departed from the Board's arguments in its *amicus* briefs relying on federal labor policy. NLRB *Amicus* Br. 8-9, *Lewis*, No. 15-2997 (7th Cir. Dec. 16, 2015) (The "Board's construction of Section 7 to encompass concerted legal activity . . . reflects the Board's judgment that legal activity accomplishes the congressional goal of avoiding strife and economic disruptions with particular effectiveness."); NLRB *Amicus* Br. 8-9, *Morris*, No. 13-16599 (9th Cir. Nov. 6, 2015) (same).

Murphy Oil would be unenforceable under *Chenery*.[6] If the Board were correct (which it was not) that it has authority to construe the NLRA to provide a right to invoke collective procedures as a matter of federal labor policy, then *Lewis* and *Morris* misread the NLRA as unambiguous and wrongly appear to eliminate the Board's discretion under *Chevron*'s second step. Although unacknowledged by those courts, advocates of the *Horton* rule might argue *Lewis* and *Morris* foreclose the Board's ability to modify the law in this area, including its ability to reconsider *Horton / Murphy Oil* based on its reassessment of labor policy and further experience. *Compare Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) ("By reversing the Board's interpretation of the statute for failing to distinguish between the organizing activities of employees and nonemployees, we were saying, in *Chevron* terms, that § 7 speaks to the issue of nonemployee access to an employer's property.") *with Weingarten*, 420 U.S. at 265–266 ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking.").

This split among the Board, the Seventh Circuit, and the Ninth Circuit is further highlighted by the

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[6] Remand under *Chenery* would not be a formality. *Cf.* Henry J. Friendly, Chenery *Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 210 ("[W]hen agency action is statutorily compelled, . . . remand in such a case would be but a useless formality."). Open questions would remain, such as whether individual arbitration agreements with opt-out provisions may be permitted as a matter of agency discretion. *See infra* at 12-13.

Ninth Circuit's approval of individual arbitration agreements if they allow employees to opt out. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014); *Morris* Pet. App. 9a n.4. The Ninth Circuit's holding conflicts with a Board decision extending *Horton* to invalidate such agreements. *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015), enf. denied, *On Assignment Staffing Servs., Inc. v. NLRB*, 2016 WL 3685206 (5th Cir. June 6, 2016). For its part, the Seventh Circuit criticized *Johnmohammadi* because the "Ninth Circuit, without explanation, did not defer to the Board" on this issue, although the Seventh Circuit failed to explain why such deference would be required if Section 7 were unambiguous as it had reasoned. *Lewis* Pet. App. 11a.

Horton / Murphy Oil, *Lewis*, and *Morris* – which are inconsistent with overwhelming authority and one another – should be rejected. Section 7 does not grant employees a right to invoke collective procedures or authorize the Board to construct such a right.

II. THE NLRA DOES NOT GRANT A SUBSTANTIVE RIGHT TO INVOKE COLLECTIVE PROCEDURES.

As the employers in these cases persuasively show, the Board, Seventh Circuit, and Ninth Circuit misapplied the FAA and this Court's FAA precedent. *Amici* endorse their arguments. *Murphy Oil*, *Lewis*, and *Morris* are also wrong for another reason: the NLRA does not provide employees a substantive right to invoke collective procedures.

A. A right under the NLRA to invoke collective procedures would be incoherent.

The NLRA right identified by the Board is incoherent because Section 7 cannot mandate class, collective, or joint proceedings. The Board recognized courts can deny employees' motions for class certification under applicable standards irrespective of its interpretation of the NLRA.[7] The Board concedes Section 7 cannot grant employees a "right to class certification" and employers may oppose employees' motions for class certification. 357 NLRB at 2286 & n.24; *Murphy Oil* Pet. App. 43a n.44 & 60a-61a.

To finesse these difficulties, the Board reasoned Section 7 grants employees only a limited right: "to take the collective action inherent in ***seeking*** class certification, whether or not they are ultimately successful under Rule 23" and "to act concertedly by ***invoking*** Rule 23, Section 216(b), or other legal procedures." 357 NLRB at 2286 (emphasis added). Under the Board's logic, the right Section 7 protects is not to proceed as a class but only to ask for class certification "without employer coercion, restraint or interference." *Id.* at 2286 n.24.

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[7] Rule 23, for example, "imposes stringent requirements for certification that in practice exclude most claims." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). The use of collective procedures also ***is subject to judicial or arbitrator discretion***. Employees in similar circumstances may receive different decisions from different judges. *E.g.*, *Noon v. Sailor*, 2000 WL 684219, at *2 (S.D. Ind. Apr. 17, 2000) ("[A] motion to certify a class calls upon a district judge to exercise his or her discretion, within the bounds of the law," and "[i]t should not be surprising that different judges may, on occasion, exercise their discretion in different ways with respect to similar questions.").

But this limited NLRA right (to act concertedly by ***invoking*** collective procedures and ***seeking*** class certification whether or not successful) makes no sense in practice. Because employers concededly may oppose class certification without regard to Section 7's concerns, the Board cannot rationally delineate what employer conduct unlawfully coerces, restrains, or interferes with this purported NLRA right. Under the Board's own terms, an individual arbitration agreement does not abridge a right to ***invoke*** collective procedures, any more than does an employer's filing an opposition to an employee's motion for class certification. This is because an individual arbitration agreement ***does not prevent employees from filing a class complaint or class certification motion that*** **invokes** ***collective procedures*** – which is the only right Section 7 supposedly protects. Under an individual arbitration agreement, the employer may respond to a class complaint or class certification motion by moving to compel individual arbitration. But the Board fails to articulate a rational difference ***for Section 7 purposes from the employee's perspective*** between an employer's responding to a class complaint with a successful motion to compel individual arbitration and responding with a successful opposition to class certification, which the Board concedes is permissible. ***In each instance, by the time the employer files its motion, the employee will have already taken the alleged "collective action inherent in seeking class certification" and acted concertedly by "invoking" collective procedures whether or not successful.*** In either

case, the employees will have fully exercised the very narrow Section 7 right that *Horton* defines.[8]

The Board can identify no purpose under the NLRA to be served by a right merely to ask for class/collective certification, which employers may lawfully oppose and courts deny for reasons irrelevant to the NLRA. *Italian Colors* forecloses any argument employees might have a non-waivable right under federal law to try to satisfy Rule 23's or other class procedural requirements on their merits. *Italian Colors,* 133 S. Ct. at 2310. The Board's attempt to overcome its inability to order collective proceedings by construing Section 7 to grant only a right to ***invoke*** collective procedures fails in practice and logic.

B. Even if a right to invoke collective procedures were meaningful, the NLRA does not unambiguously grant it.

The Seventh and Ninth Circuits' holdings that Section 7 ***unambiguously*** grants a right to invoke collective procedures conflict with the Board's decisions in *Horton* and *Murphy Oil*. *Supra* at 9-12. Those courts' easy discernment of unambiguous

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[8] Additionally, consider a single employee who files a putative class action. The employer pays the employee for his resigning voluntarily, releasing his claims, and dismissing his suit before he moves for class certification. Does this settlement agreement unlawfully restrain the employee's exercise of Section 7 rights? Or the employer deposits the full amount of the employee's individual claim in an account payable to the employee, the court enters judgment for the employee in that amount, and the employer moves to dismiss the case as moot before the employee moves for class certification. *Cf. Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). Does this employer conduct violate the NLRA?

Congressional intent in Section 7 is also at odds with nearly 80 years of precedent demonstrating the term "concerted activit[y]" in Section 7 rarely compels specific interpretations. *E.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830-37 (1984); *Weingarten*, 420 U.S. at 266–67. It is well established Congress did not generally speak to "precise questions" in the NLRA or Section 7. *Compare Chevron*, 467 U.S. at 842–43 & n.9, *with Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945) ("The [NLRA] did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).[9]

To the extent Section 7 is unambiguous regarding collective procedures, it unambiguously ***excludes*** them by the NLRA's silence concerning adjudicatory procedures, which are outside the statute's purpose. Section 7's text and legislative history do not mention collective procedures. *Horton II*, 737 F.3d at 360-361. This is unsurprising. The FLSA's collective action provision, Section 216(b), was not adopted until three years after the NLRA's 1935 enactment, and the contemporary procedures for "certifying" collective actions under Section 216(b) were developed by courts only in the 1980s. *Hoffmann-La Roche, Inc. v.*

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[9] Although many of this Court's decisions interpreting the NLRA pre-date *Chevron*, they are consistent with its framework. *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 134 (1987) (Scalia, J., concurring). With rare exceptions, those decisions begin their review of Board decisions at the equivalent of *Chevron*'s second step. *Supra* at 7; *but see Lechmere*, 502 U.S. at 537 (Section 7 creates a distinction "of substance" in *Chevron* terms between employees and non-employees for certain purposes); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Sperling, 493 U.S. 165, 169, 173 (1989). The modern class action did not exist in federal courts until 1966, over 30 years after the NLRA was enacted. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-15 (1997). It is nonsensical to suggest Congress ***unambiguously*** granted a right under Section 7 to invoke adjudicatory procedures that did not exist when Section 7 was passed.

Lewis's speculation that "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA" lacks citation to any Congressional authority and misconstrues the history of group litigation procedures. *Lewis* Pet. App. 9a. The Seventh Circuit claimed class and collective action procedures "had existed for a long time on the equity side of the court" and "representative and collective legal procedures have been employed since the medieval period." *Id.* at 8a. But *Lewis*'s superficial history glosses over dates and gets the essentials wrong. Although "[t]he origins of the class action can be traced back to medieval times, . . . it was not originally designed to enable a collection of unrelated individuals to assert a claim for money damages against a common defendant." John C. Coffee, Jr., *Entrepreneurial Litigation* 52 (2015). The older equity cases noted by the Seventh Circuit instead "tended to involve closely knit groups" with "preexisting relationships." *Id.* And the view that collective procedures might aggregate and facilitate the litigation of small money damages claims first arose with a law review article in 1941, six years after the NLRA was enacted. *Id.* (citing Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).) That article appeared three years after the Federal Rules were adopted and "had no influence on those rules." *Id.* at 54. Between 1938 and

1966, the closest thing to the modern class action in federal court was then-Rule 23's "spurious" class action device, but even that "did not intend the aggregation of thousands of persons into a united action for money damages." *Id.* at 55. Instead, it was apparently intended only as a "permissive" joinder device. *Id.* Not until 1966 did the Federal Rules Committee fashion "an entirely new Rule 23," creating the modern class action. *Id.* at 60.

Lewis failed to cite any case from 1935 or earlier in which an employee brought a representative action for money damages on behalf of others. The Seventh Circuit's conclusion Congress "was aware" in 1935 of the procedures at issue here – years before they existed – lacks any basis. *Cf. Concepcion*, 563 U.S. at 349 ("[C]lass arbitration was not even envisioned by Congress when it passed the FAA in 1925."). And *Lewis*'s and *Morris*'s holdings that Congress ***unambiguously*** granted a right to invoke collective procedures under Section 7 should be rejected out of hand.

C. No precedent holds the NLRA grants employees a right to invoke collective procedures.

The Fifth Circuit correctly held the "'use of class action procedures . . . is not a substantive right' under Section 7 of the NLRA." *Murphy Oil* Pet. App. 5a (quoting *Horton II*, 737 F.3d at 362).[10] The Fifth

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[10] The Board wrongly asserts the Fifth Circuit "did not take issue with the Board's expert interpretation of Section 157." *Murphy Oil* Pet. 12. To the contrary, the Fifth Circuit rejected the Board's interpretation that Section 7 provides a substantive right to class procedures. *Murphy Oil* Pet. App. 5a

Circuit's view is consistent with eight decades of precedent.

1. *Eastex* did not recognize a Section 7 right to invoke collective procedures.

The Board, *Lewis*, and *Morris* all cited *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) as though this Court already determined the NLRA grants employees a right to invoke collective procedures. *Horton*, 357 NLRB at 2278; *Lewis*, 823 F.3d at 1152; *Morris*, 834 F.3d at 982 n.3. All mischaracterized *Eastex*.

Eastex involved a union's distribution of a newsletter urging employees to write to their legislators to oppose a right-to-work law and criticizing a presidential veto of a minimum wage law. 437 U.S. at 568-70. The employer contended this activity was not within Section 7's "mutual aid or protection" clause because it did "not relate to a 'specific dispute' between employees and their own employer 'over an issue which the employer has the right or power to affect.'" *Id.* at 563. This Court disagreed. It held this activity was protected because Section 7 can cover employees when they seek "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565. For context, the Court observed:

> Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to

> protect their interests as employees are within the scope of this clause.

Id. at 565-66.

The Board, *Lewis*, and *Morris* failed to recognize that *Eastex*'s reference to "resort to administrative and judicial forums" was *dicta* and this Court qualified that *dicta* by declaring "***[w]e do not address here the question of what may constitute 'concerted' activities in this context.***" *Id.* at 566 n.15 (emphasis added). The question presented here – what might constitute "concerted" activities in the context of resort to judicial and other forums – was expressly reserved by *Eastex*.

2. *Salt River Valley* did not recognize a Section 7 right to invoke collective procedures.

Horton also mischaracterized *Salt River Valley* as impliedly recognizing a right to invoke collective procedures. 357 NLRB at 2279.[11] That case actually demonstrates that "concerted legal activity" is not synonymous with class proceedings. There, employees believed they were due wages under the FLSA. *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 863-64 (1952). One employee circulated a petition through which co-workers designated him "to take any and all actions necessary to recover for [them] said monies, whether by way of suit or negotiation, settlement and/or compromise" and authorized him to employ an attorney. *Id.* at 864. His employment was soon terminated.

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[11] *See also Murphy Oil* Pet. App. 32a n.24 & 56a.

The Board ignores the fact that the employees in *Salt River Valley* never sued or invoked collective procedures. Rather, their "concerted legal activity" occurred ***outside*** any adjudicatory proceeding. That protected conduct involved the employees' attempting to exert group pressure on their employer to negotiate a settlement of their demands by circulating a petition and pooling resources to finance possible litigation. *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953).

Strikingly, the Board identified no "concerted legal activity" undertaken by the employees in *Salt River Valley* that an individual arbitration agreement would prevent. That case shows Section 7 does not grant a right to invoke collective procedures but rather protects employees from retaliation when they concertedly assert legal rights.

3. No other precedent has recognized a Section 7 right to invoke collective procedures.

The other unfair labor practice decisions cited by the Board also fail to suggest the NLRA grants employees a right to invoke collective procedures. The prior decisions referring to legal proceedings show only that employers may not retaliate against employees for jointly filing a legal complaint, grievance, and administrative charge that asserts employment-related legal rights. 357 NLRB at 2278-79 & n.4.[12] None suggests

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[12] These decisions are also distinguishable because an employer's moving to compel individual arbitration is not retaliation. And unlike discharging employees for concerted activity, requiring individual arbitration agreements as a condition of employment is consistent with federal policy under the FAA. *See Circuit City*, 532 U.S. at 122-23.

employees have a right under the NLRA to invoke specific procedures for adjudicating their legal claims.

The Board also could cite no decision holding the NLRA renders contracts unenforceable because they allegedly interfere with employees' ability to invoke collective procedures. The Board cited only decisions enforcing the Board's remedial orders that specific employers cease and desist from enforcing individual employment agreements based on evidence those employers used those agreements to interfere with collective bargaining. *Horton*, 357 NLRB at 2280-81 & n.7.[13]

Moreover, the cases cited by the Board voiding individual agreements all pre-date *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). There, an employer claimed it need not bargain collectively because it had already entered individual agreements with employees prior to a certification of the union as their exclusive bargaining representative. This Court did ***not void the individual agreements*** but held their existence did not excuse the employer from bargaining collectively because the individual agreements would be superseded by any resulting collective bargaining agreement. *Id.* at 336-38.[14]

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[13] The Board also wrongly relied on *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), failing to note the NLRA provision at issue in that case, Section 8(e), ***expressly*** voids certain contracts, unlike Section 8(a)(1). 357 NLRB at 2287; *Murphy Oil* Pet. App. 44a n.47.

[14] Under *J.I. Case*, if a union came to represent Murphy Oil's, Epic Systems', or Ernst & Young's employees and the parties entered a collective bargaining agreement, that agreement might ***supersede*** individual arbitration agreements, but *J.I. Case* does not otherwise void those agreements. *Cf. Johnmohammadi*, 755 F.3d at 1076-77.

No precedent supports the view that the NLRA renders individual arbitration agreements unenforceable or "illegal."

III. THE BOARD LACKS AUTHORITY TO GRANT EMPLOYEES A NEW RIGHT TO INVOKE COLLECTIVE PROCEDURES.

While the Board may have responsibility "to adapt the Act to changing patterns of industrial life," reviewing courts "are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act." *Weingarten,* 420 U.S. at 266 (citation omitted). Courts must ensure the Board's remedial preferences do not "potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic*, 535 U.S. at 144.

Even if the NLRA did not unambiguously ***exclude*** an alleged right to invoke collective procedures, the Board's attempt to construct such a right would not be entitled to deference because the Board "wholly ignore[d] other and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47. The Board's attempt to recognize this new right runs contrary to the language and tenor of the Act and trenches upon laws and policies outside the Board's expertise and authority.

A. A purported NLRA right to invoke collective procedures conflicts with the Rules Enabling Act.

This Court has already made clear that the "right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332

(1980). The Board's attempt to construct a substantive right under the NLRA to invoke those procedures conflicts with the Rules Enabling Act ("REA"), which the Board failed to cite or address.

In the REA, Congress delegated authority to this Court to promulgate the Federal Rules. 28 U.S.C. § 2072(b). The REA provides the Federal Rules "shall not abridge, enlarge or modify any substantive right." *Id.* In *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, a Court plurality explained a rule of procedure is valid under the REA only if it "really regulat[es] procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 559 U.S. 393, 406 (2010) (internal quotation marks and citation omitted). The plurality reasoned Rule 23 is permissible because:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Id. at 408 (emphasis added).

Here, the Board erroneously treats Rule 23 as ***enlarging*** substantive rights under the NLRA and ***abridging*** them under the FAA. On one hand, the Board contends employees have a substantive right under the NLRA to invoke Rule 23 and seek class certification. ***But a "right" to invoke Rule 23 could not exist without the rule itself.*** Consider a hypothetical in which Rule 23 were never promulgated.

Section 7 standing alone would not provide employees a right to seek class certification in federal court. Under the Board's view, this purported non-waivable right grew out of Section 7 with Rule 23's adoption. The Board treats Rule 23 as expanding employees' substantive rights under Section 7, which the REA prohibits.

Simultaneously, the Board treats Rule 23, when combined with Section 7, as ***abridging*** parties' substantive rights under the FAA to agree to procedures governing their arbitrations. If the Board were correct, this outcome also would violate the REA. *See Italian Colors*, 133 S. Ct. at 2309-10 (an entitlement to class proceedings would abridge or modify substantive rights in violation of the REA); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487-88 (2d Cir. 2013) (under the REA, "Rule 23 cannot create a non-waivable, substantive right to bring" a pattern-or-practice class action under Title VII).

B. Invoking collective procedures is not the same as engaging in "concerted legal activity" under the NLRA.

The Board also erred by treating "concerted legal activity" (a term not found in the NLRA) as synonymous with invoking collective procedures. But if "concerted legal activity" means employees' concerted assertion of legal rights or pursuit of legal claims, such activity does not require, and is not the equivalent of, invoking collective procedures.

In his partial dissent in *NLRB v. Alternative Entertainment Inc.*, 2017 WL 2297620, at *15 (6th Cir. May 26, 2017) (Sutton, J., dissenting in part), Judge Sutton noted the "key question, which the Board and the majority do not confront, is what makes . . . a

lawsuit 'concerted.'" Although the "Board assumes that, when a court or arbitrator consolidates employees' claims through a class action or joinder, the employees litigate concertedly," in reality, "the 'concertedness' of litigation does not turn on the particular procedural form that litigation takes." *Id.* Rather, "[a]n activity is 'concerted' as long as workers mutually plan and support it." *Id.* Judge Sutton explained:

> Whether a group of employees brings a class action, joint claims, separate claims, or whether the group supports a single-plaintiff suit, their legal action is protected if they are substantively cooperating in the litigation campaign—say by pooling money, coordinating the timing of their claims, or sharing attorneys and legal strategy. These are the sort of collaborative activities—which employees can engage in of their own accord and not at the leave of a judge—that Section 7 protects.

Id. Employees cannot "mutually contrive or agree" to litigate as a class, because "[a] judge or arbitrator makes the decision to group claims together based on the procedural rules of the forum." *Id.* "It would make little sense for the 'concertedness' of a litigation campaign to turn on judicial decisions over which workers have no control." *Id.*

Judge Sutton is correct. As exemplified by *Salt River Valley*, *see supra* at 21-22, employees may engage in "concerted legal activity" without regard to collective procedures. Irrespective of such procedures or their waiver, employees can work together to pursue legal claims and assert legal rights by, among other things, (1) pooling their finances, (2) making joint demands and negotiating as a group, (3) sharing information,

(4) soliciting other employees to assert the same legal rights, (5) acting in concert to initiate multiple individual suits alleging the same legal claims, (6) obtaining common representation, (7) jointly investigating their legal claims, (8) developing common legal theories and strategies, and (9) testifying for one another. *Cf.* Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 92 (2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Individual arbitration agreements do not, and cannot, prevent employees from engaging in "concerted legal activity," as federal dockets show. *See, e.g.*, Compl. ¶¶ 1 & 2, *20/20 Communic'ns, Inc. v. Blevins et al.*, No. 4-16cv-810-A (N.D. Tex. Aug. 31, 2016), ECF No. 1 (noting 18 current and former employees subject to individual arbitration agreements filed coordinated individual arbitrations represented by same attorney alleging same claims); Aff. Rebecca S. Predovan ¶¶ 1-10, *Kicic v. Hobby Lobby Stores, Inc.*, Case No. 2:16-cv-197 (S.D. Ind. June 24, 2016), ECF No. 16-1 (noting two former employees subject to individual arbitration agreements were represented by the same attorneys and simultaneously filed individual arbitrations alleging same claims).

C. Invoking collective procedures is not inherently concerted activity under the NLRA.

The Board further errs by treating invoking collective procedures as inherently concerted activity. 357 NLRB at 2279 ("Clearly an individual who files a class or collective action regarding wages, hours or working conditions . . . seeks to initiate or induce group action and is engaged in conduct protected by Section 7."); *Murphy Oil* Pet. App. 57a; *200 East 81st Rest. Corp.*, 362 NLRB No. 152.

The Board, opining on procedures outside its expertise, is wrong. Under Federal Rule 23 and Section 216(b), plaintiffs can, and often do, file class/collective actions for their individual benefit. A plaintiff's attorney may include class/collective allegations in a complaint to raise the stakes for the defendant and obtain a quicker or larger settlement ***on behalf of that individual plaintiff***.[15]

The plaintiff (and her attorney) who files a class action complaint may never intend to induce group action. The attorney who represented the charging party in *Horton* is one example. That attorney routinely files FLSA complaints with a single plaintiff but invoking collective procedures; he does not move for collective certification; no other individual opts into the case; and he settles the case ***as a single-plaintiff***

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[15] Merely filing of a putative class/collective action may impose significant costs by placing the defendant under a duty to preserve potentially relevant evidence relating to the putative class/collective. Plaintiffs may argue such duties arise ***prior*** to certification. *E.g., Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7, 2011) (employer incurred over $1.5 million in expenses to preserve putative class members' hard drives prior to certification decision).

lawsuit. *See, e.g., Phillip v. Angels Exp. Delivery Serv., Inc.*, No. 8:11-cv-00312 (M.D. Fla.), ECF No. 1 (collective action complaint under FLSA on behalf of single plaintiff) & ECF No. 24 ¶ 7 (motion to approve individual settlement under which plaintiff received $2,000.00 in alleged back wages and her attorney $7,500.00 in fees); *Olvera v. Fla. Aluminum & Steel, Inc.*, No. 2:10-cv-00425 (M.D. Fla.), ECF No. 1 (collective action complaint under FLSA on behalf of single plaintiff) & ECF No. 38 ¶ 6 (motion to approve individual settlement). Other attorneys pursue the same strategy. *See, e.g., Rosser et al. v. RTC Resource Acquisition, Corp.*, No. 1:09-cv-792 (S.D. Ind.), ECF No. 1-3 (collective action complaint) & ECF No. 28 (motion to dismiss based on individual settlement).

D. Invoking collective procedures is connected to the concerns of plaintiffs as *litigants*, not as employees.

The Board fails to acknowledge that not all "concerted" employee activity is protected by Section 7. *Eastex* teaches that "some concerted activity bears a less immediate relationship to employees' interests as employees than other such activity" and that "at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 567-68. Thus "[t]here may well be types of conduct . . . that are . . . so remotely connected to the concerns of employees ***as employees*** as to be beyond the protection of the clause." *Id.* at 570 n.20 (emphasis added).

Applying *Eastex*, courts and the Board have repeatedly found concerted employee activity was not protected when it was insufficiently connected to employees' concerns as employees. *E.g., Tradesmen*

Int'l, Inc. v. NLRB, 275 F.3d 1137, 1141, 1143 (D.C. Cir. 2002) (employer did not violate Section 7 by refusing to hire union organizer after he lobbied city government to require employer to pay a bond for work performed within the city because lobbying was an effort to raise employer's costs rather than improve working conditions); *Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 78 (2d Cir. 1992) (running for office in a union that had no bargaining relationship with employer was not protected because activity was "completely unrelated to the employer-employee relationship"); *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182 (1992) (although employee's distribution of petition at work advocating that employee stock option plan purchase a 50% share of employer's parent company was "concerted" and the purchase might have affected employee benefits, activity was not protected by Section 7 because "the proposal [did] not advance employees' interests as employees but rather advance[d] employees' interests as entrepreneurs, owners, and managers").

Invoking collective procedures, even if concerted, relates to plaintiffs' concerns ***as litigants***, not employees. When a court or arbitrator grants or denies class certification, it is under the procedural standards applicable in the forum without consideration of whether certification might facilitate employees' mutual aid or protection under the NLRA, impact their employment terms, or advance any other interests of the litigants ***as employees***. *Alt. Entm't*, 2017 WL 2297620, at *15 (Sutton, J., dissenting in part) ("All of these procedural requirements [of Rule 23, Section 216(b), and Rule 20] must be met before plaintiffs can proceed collectively, no matter what Section 7 says.").

Before *Horton*, no authority suggested the NLRA governs whether employment-related legal claims should be adjudicated collectively. This is unsurprising, because adjudication is outside the NLRA's scope. The NLRA concerns bargaining between employers and employees regarding terms and conditions of employment. *City Disposal*, 465 U.S. at 845 ("[I]n enacting § 7 . . . , Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The adjudication of legal claims differs from bargaining; it is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed. 2009) (defining "adjudication"); *see also Shady Grove*, 559 U.S. at 408 (plurality opinion) ("A class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits.").

Employers and employees bargain, and judges and arbitrators adjudicate. The procedures used by judges and arbitrators to decide legal claims are unrelated to the NLRA's purpose of equalizing employees' and employers' bargaining power. The Board cannot contend employees' legal claims become stronger when adjudicated collectively. An employee who pursues her employment-related legal claim as a member of a 1,000-person class has no greater right under the FLSA or any other law than when she pursues her claim individually. Nor is an employee more likely to receive a favorable judgment by seeking adjudication of her claim in a collective proceeding. Judges and arbitrators adjudicate each party's claims based on the law and facts, ***irrespective of the parties' power***. *See, e.g.*, 28 U.S.C. § 453 (requiring each judge or justice of the United States to swear he or she "will

administer justice without respect to persons, and do equal right to the poor and to the rich").[16]

E. The Board cannot grant employees a right to invoke collective procedures to force settlement.

In *Murphy Oil*, the Board attempted to link adjudication with bargaining. It reasoned "as a practical matter, litigation routinely does involve not only adjudication by a court or arbitrator, but also bargaining between the parties: that is how cases settle, as most of them do." *Murphy Oil* Pet. App. 60a. But the Board is not empowered to determine the adjudicatory procedures employees may invoke – preempting the FAA, the Federal Rules, Section 216(b), state procedural rules, arbitration agreements, and judicial precedent – simply because litigation between employers and employees may involve settlement negotiations.

Perhaps the Board assumes employees' access to collective procedures could increase their leverage in negotiating settlement. Collective procedures can impose on defendants disproportionate costs and the risk of ruin in the event of an erroneous judgment, compelling defendants to settle without regard to the claims' merits. But commentators and courts view this as a problem with class/collective procedures. *See, e.g.*, *Concepcion*, 563 U.S. at 350 (noting "the risk of 'in terrorem' settlements that class actions entail");

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[16] Employment claims do not require aggregation to be effectively vindicated because employment statutes award attorneys' fees and costs to prevailing employees, incentivizing individual claims. *See* 45C Am. Jur. 2d Job Discrimination § 2618. The fees awarded can greatly exceed the employee's damages recovered. *E.g.*, *Cain v. Almeco USA, Inc.*, 2014 WL 2158413, at *1 (N.D. Ga. May 23, 2014); *Diaz v. Jiten Hotel Mgmt., Inc.*, 741 F.3d 170, 172 (1st Cir. 2013).

In re Bridgestone/ Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002); Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments) ("An order granting certification . . . ***may force a defendant to settle*** rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." (emphasis added)); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Nothing in the NLRA authorizes the Board to determine what procedures must be available to employees to increase their power in settlement negotiations. Any increase in bargaining power that invoking collective procedures gives plaintiffs does not result from group employee activity but is the problematic byproduct of adjudicatory procedures. Extracting settlement by using procedures to threaten extreme expenses and risks would be "judicial blackmail," not equalized bargaining based on concerted activity. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Even assuming *arguendo* settlement negotiations could be viewed as NLRA-covered bargaining, the Board may not choose employers' and employees' respective economic weapons in bargaining. The Board is not authorized to grant employees a right to deploy judicial procedures as an economic weapon or bar employers from using individual arbitration because it may blunt that economic weapon. *See, e.g., Am. Ship Bldg. Co.*, 380 U.S. at 318 ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) ("[T]here are many economic weapons which an employer may use that . . . interfere in some

measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'"); *Ins. Agents' Int'l Union*, 361 U.S. at 499-500 ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.").

CONCLUSION

For all of the reasons set forth above, *Horton/Murphy Oil*, *Lewis*, and *Morris* were wrongly decided and should be overruled.

Respectfully submitted,

RON CHAPMAN, JR.
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
8117 Preston Road, Ste. 500
Dallas, TX 75225
(214) 987-3800
ron.chapman@odnss.com

BRIAN E. HAYES
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1909 K Street, N.W., Ste. 1000
Washington, D.C. 20006
(202) 263-0261
brian.hayes@odnss.com

CHRISTOPHER C. MURRAY
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46260
(317) 916-1300
christopher.murray@odnss.com

Counsel for Amici Curiae

June 16, 2017

RECORD AND BRIEF

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,

v.

STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth, And Fifth Circuits

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS IN CASE NOS. 16-285 AND 16-300 AND RESPONDENT MURPHY OIL USA, INC. IN CASE NO. 16-307

DRI–THE VOICE OF THE DEFENSE BAR
JOHN E. CUTTINO
55 W. Monroe St., Ste. 2000
Chicago, Illinois 60603
(312) 795-1101
jcuttino@gwblawfirm.com

HORVITZ & LEVY LLP
DAVID M. AXELRAD
(*Counsel of Record*)
FELIX SHAFIR
JOHN F. QUERIO
3601 W. Olive Ave., 8th Fl.
Burbank, California 91505
(818) 995-0800
daxelrad@horvitzlevy.com

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI–the Voice of the Defense Bar (DRI) is an international organization that includes more than 22,000 members involved in the defense of civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as *amicus curiae* in cases that raise issues of vital concern to its members, their clients, and the judicial system.

This case is of significant interest to DRI because its members routinely represent clients seeking to compel individual arbitration of claims brought under wage-and-hour or other labor laws that are subject to binding arbitration clauses containing class action waivers. Accordingly, DRI's members are familiar with the increasingly common occurrence of the National Labor Relations Board (NLRB), and even

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[1] This brief was authored by *amicus curiae* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

some courts, invalidating arbitral class action waivers based on employees' purported federal labor law right to pursue wage-and-hour claims on a collective basis.

This case is the culmination of a sustained campaign by the NLRB and the employment plaintiffs class action bar to nullify this Court's recent precedent by refusing to obey the preemptive mandate of the Federal Arbitration Act (FAA) that arbitration clauses—including arbitral class action waivers—be enforced according to their terms. *See In re D. R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) (originating this effort); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014) (reaffirming *D. R. Horton* ruling); Albina Gasanbekova, *Building a Circuit Split-Updating Moves By the NLRB on Class Waivers*, 34 Alternatives to High Cost Litig. 60, 60 (2016) (the NLRB has issued several dozen decisions nationwide overturning arbitral class action waivers); Eric L. Barnum & Joshua A. Kurtzman, *More Money, More Problems: Class Action Waivers in Mandatory Arbitration Agreements Hit Roadblocks from the NLRB*, Emp. L. Landscape (Feb. 8, 2016), http://goo.gl/P8TXdH (in December 2015 alone, NLRB reportedly issued "well over a dozen decisions striking down class action waivers in arbitration clauses"). Of particular concern to DRI and its members is the NLRB's and some courts' refusal to acknowledge this Court's consistent teaching that the FAA's directive can be overridden only by a contrary congressional command that is expressed in the text of another federal statute in the clearest and most express possible terms. Nothing of the kind exists in the National Labor Relations Act (NLRA).

DRI and its members seek uniform application of the FAA across the nation in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. In particular, class action waivers in employment arbitration agreements allow employers and the civil justice system to avoid the many injustices and disadvantages of the class action mechanism in wage-and-hour litigation. The prospect of a mass proceeding—aggregating thousands or even millions of claims, threatening to produce a crippling liability determination, and possibly imposing a damages award that would annihilate the employer as a going concern—creates a pressure on employer defendants to settle such cases that is virtually irresistible, and a reality that robs the court system of its rightful role in deciding the merits of such claims. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (same); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.").

The decisions of the Seventh Circuit, the Ninth Circuit, and the NLRB in these cases, by invalidating class action waivers in employment arbitration agreements, threaten to revive the evils of the class action device that were thought to have been put to rest in *Concepcion* and *Italian Colors*. This Court should therefore invalidate the NLRB's *D. R. Horton*

rule on which those decisions are based and restore the FAA's role of ensuring that arbitration agreements, including arbitral class action waivers, are enforced according to their terms.

SUMMARY OF ARGUMENT

Enacted "in response to widespread judicial hostility to arbitration," the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms," including terms setting "'the rules under which that arbitration will be conducted.'" *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013) (citations omitted). Since the FAA's enactment, this judicial hostility has continued to manifest itself through "'a great variety' of 'devices and formulas'" to avoid enforcing arbitration agreements as written. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (citation omitted).

The latest such device is the NLRB's *D. R. Horton* rule—repeatedly reaffirmed by the NLRB and adopted by the Seventh and Ninth Circuits in two of the three cases under review—which interprets the NLRA to confer a substantive right on employees to pursue their wage-and-hour claims on a class or collective basis, and invalidates class action waivers in employment arbitration agreements by narrowing the FAA so that it does not stand in the way. In arbitral class action waivers like those at issue here, plaintiffs agree to: (1) pursue their claims in arbitration, rather than in court; and (2) proceed in arbitration on an individual, bilateral basis, rather than on a class or

collective basis. The *D. R. Horton* rule effectively nullifies this Court's decisions in *Concepcion*, *Italian Colors*, and many other cases that broadly construe the FAA to provide robust protection to such arbitration agreements that require claims to proceed on an individual, bilateral basis in accordance with fundamental attributes of arbitration.

Recognizing the *D. R. Horton* rule's vulnerability under *Concepcion* and its progeny, the NLRB and the Seventh and Ninth Circuits relied on two arguments to shield the rule from attack. First, they claimed the rule fell within the protection of the FAA's saving clause, which preserves from preemption "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). Second, they maintained that employees' right under the NLRA to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157 (2012), amounted to a "'contrary congressional command'" overriding the FAA, *see CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). Both of these rationales are fundamentally flawed.

The FAA's saving clause cannot shelter the *D. R. Horton* rule because the rule disfavors arbitration in precisely the manner this Court condemned in *Concepcion*. "Th[e] saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses . . . ,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citation omitted). That is exactly what the *D. R. Horton* rule does. While the Seventh and Ninth Circuits and the NLRB below

claimed the rule treats arbitration clauses the same as any other contract, this claim is belied by the fact that the *D. R. Horton* rule requires collective proceedings and thereby eviscerates arbitral class action waivers. "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344; *accord Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its "'principal purpose'" is the enforcement of arbitration agreements according to their terms.").

Nor can the *D. R. Horton* rule be sustained on the ground that it amounts to a contrary congressional command in the NLRA overriding the FAA. As this Court's cases applying the test make clear, the contrary congressional command claimed to override the FAA's mandate must actually appear in the text of the other federal statute. *See, e.g., Italian Colors*, 133 S. Ct. at 2309-10; *CompuCredit*, 565 U.S. at 100-01, 103-04. The generic reference in section 7 of the NLRA to employees' right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, simply does not come close to the "clarity" this Court has required of a competing federal statute in order to override the FAA, *CompuCredit*, 565 U.S. at 103. The "concerted activities" provision does not mention arbitration or class actions, and contains no indication that Congress intended section 7 of the NLRA to displace the FAA's mandate.

Accordingly, this Court should disapprove the NLRB's *D. R. Horton* rule and restore the FAA to its rightful place in ensuring that employment arbitration agreements—including arbitral class action waivers—are enforced according to their terms.

ARGUMENT

I. THE NLRB'S *D. R. HORTON* RULE RUNS AFOUL OF THE FAA REGARDING THE ENFORCEABILITY OF ARBITRAL CLASS ACTION WAIVERS. THE FAA'S SAVING CLAUSE CANNOT RESCUE IT.

A. The FAA requires that arbitral class action waivers be enforced according to their terms.

The FAA was enacted "in response to widespread judicial hostility to arbitration." *Italian Colors*, 133 S. Ct. at 2308-09. It embodies "a 'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (citation omitted).

The FAA's core provision mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, the FAA requires that "courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Concepcion*, 563 U.S. at 339 (citations omitted). "The final phrase of § 2," known as the

"saving clause[,] permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* (citations omitted).

As part of this directive, the FAA "mandates enforcement of agreements to arbitrate statutory claims." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Thus, more than a quarter of a century ago, this Court held that the FAA requires employees to arbitrate statutory wage claims. *Perry v. Thomas*, 482 U.S. 483, 486-93 (1987); *accord Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

The FAA's mandate applies to claims arising under federal statutes, and that mandate can only "be overridden by a contrary congressional command. The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *McMahon*, 482 U.S. at 226-27 (citations omitted).

B. The NLRA protects employees' right to engage in concerted activities for mutual aid or protection but says nothing about class actions or arbitration.

Section 7 of the NLRA provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

> through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157. The NLRA declares it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" section 7. 29 U.S.C. § 158(a)(1) (2012). These provisions say nothing about arbitration or class actions.

In 2012, for the first time, the NLRB interpreted these NLRA provisions to confer on employees a substantive federal right to pursue employment claims—including statutory wage claims—in court on a class or collective basis and to invalidate arbitral class action waivers as an unfair labor practice. *D. R. Horton*, 357 N.L.R.B. at 2277-82; *see also Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1-2, *5-11 (reaffirming *D. R. Horton* rationale).

C. The FAA's saving clause does not preserve the *D. R. Horton* rule's invalidation of arbitral class action waivers.

Since issuing *D. R. Horton*, the NLRB—now joined by the Seventh and Ninth Circuits—has repeatedly adhered to its determination that the NLRA entitles plaintiffs to pursue their wage-and-hour claims on a class or collective basis. *See* Epic Systems' (Epic) Pet. App. 1a-2a; Ernst & Young's (E&Y) Pet. App. 1a; NLRB Pet. App. 17a-23a; Gasanbekova, *supra*, at 60. However, this Court held in *Concepcion* that class

proceedings "interfere[ ] with fundamental attributes of arbitration and thus create[ ] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344; *see id.* at 348. The Court subsequently reaffirmed this holding, stressing that class proceedings contravene the FAA by "'sacrific[ing] the principal advantage of arbitration—its informality—and mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.'" *Italian Colors*, 133 S. Ct. at 2312 (citation omitted). The NLRB has thus attempted to deny precisely what the FAA protects—the enforceability of class action waivers in arbitration agreements.

Although this Court has repeatedly held that the proper way to reconcile any potential conflict between the FAA and another federal statute is the contrary congressional command test, *see infra*, pp. 13-21, the Seventh and Ninth Circuits and the NLRB instead attempted to reconcile this conflict by relying on the FAA's saving clause. They maintained that the *D. R. Horton* rule does not target arbitration and would apply equally in litigation or any other dispute resolution forum, such that the rule puts arbitration agreements on an equal footing with all other contracts. Epic Pet. App. 15a-17a; E&Y Pet. App. 12a-14a, 20a-23a; NLRB Pet. App. 34a-35a, 44a-45a.

Putting aside the fact that the Seventh and Ninth Circuits improperly ignored the contrary congressional command test, *see infra*, pp. 13, 22-25, their application of the FAA's saving clause is fundamentally flawed. This Court specifically rejected their reasoning in *Concepcion*, using as an example a rule barring enforcement of arbitral restrictions on

discovery as against public policy. *Concepcion*, 563 U.S. at 341-42. Even if such a rule were labeled a general rule equally applicable to all contracts, including those outside the arbitral context, this Court firmly declared that "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* at 342. *Concepcion* thus condemned this mode of analysis as manifesting "the judicial hostility towards arbitration that prompted the FAA [which] had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (holding FAA invalidates any "rule discriminating on its face against arbitration" and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements").

The central fallacy of the Seventh and Ninth Circuits' and the NLRB's reasoning is their unsupported assumption—directly forbidden by *Concepcion* and its progeny—that an arbitral class action waiver is not integral to the arbitration agreement of which it forms a part. *See* Epic Pet. App. 12a; E&Y Pet. App. 13a-14a, 22a-23a; NLRB Pet. App. 43a-45a; *see also* NLRB Pet. App. 181a-182a (Johnson, Member, dissenting). As this Court has explained, bilateral proceedings are a fundamental attribute of arbitration protected by the FAA, and attempts to force parties to proceed on a class or collective basis in contravention of a binding arbitral class action waiver

are forbidden. *See Concepcion*, 563 U.S. at 344, 348; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683-84 (2010) (holding that "parties may specify *with whom* they choose to arbitrate their disputes," and "[i]t falls to courts and arbitrators to give effect to these contractual limitations" in order "to give effect to the intent of the parties"); *Italian Colors*, 133 S. Ct. at 2312 n.5 ("[T]he FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its '"principal purpose"' is the enforcement of arbitration agreements according to their terms.").

Thus, when some other law mandates collective proceedings (even as a general rule), that law—when applied to an arbitral class action waiver—"derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue," "interferes with fundamental attributes of arbitration[,] and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 339, 344.

The FAA's saving clause cannot justify the *D. R. Horton* rule because "a federal statute's saving clause '"cannot in reason be construed as [allowing] a . . . right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."'" *Concepcion*, 563 U.S. at 343 (citations omitted). Thus, the *D. R. Horton* rule is squarely irreconcilable with the FAA.

II. THE *D. R. HORTON* RULE SHOULD BE OVERTURNED BECAUSE THE NLRA'S TEXT DOES NOT CONTAIN A CONTRARY CONGRESSIONAL COMMAND OVERRIDING THE FAA'S MANDATE THAT ARBITRAL CLASS ACTION WAIVERS BE ENFORCED ACCORDING TO THEIR TERMS.

By invoking the FAA's saving clause to justify the *D. R. Horton* rule's invalidation of class action waivers in employment arbitration agreements, the Seventh and Ninth Circuits avoided having to confront the dispositive question in these cases: whether anything in the text of the NLRA overrides the FAA's mandate that arbitral class action waivers must be enforced according to their terms. This Court has many times addressed whether another federal statute contains a contrary congressional command overriding the FAA, and has formulated a clear statement rule governing these cases: unless the text of the other federal statute clearly evinces Congress's intent to override the FAA, the FAA's mandate prevails and requires that the arbitration agreement be enforced. *See Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 100-01, 103-04.

A. In any claimed conflict between the FAA and another federal statute, the FAA governs unless the other statute embodies a contrary congressional command overriding the FAA's mandate.

The FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms, . . . including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes,' . . . and 'the rules under which that arbitration will be conducted.'" *Italian Colors*, 133 S. Ct. at 2309 (citations omitted); *see also CompuCredit*, 565 U.S. at 98. "That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been '"overridden by a contrary congressional command."'" *Italian Colors*, 133 S. Ct. at 2309 (citations omitted).

While this Court has utilized various methods over the years to analyze whether a contrary congressional command can be found in another federal statute, its modern precedent has never actually reached that conclusion in the numerous times it has addressed this issue. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *McMahon*, 482 U.S. 220; *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Gilmer*, 500 U.S. 20; *CompuCredit*, 565 U.S. 95; *Italian Colors*, 133 S. Ct. 2304.[2]

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[2] *Wilko v. Swan* did invalidate an arbitration clause on the ground that it fell afoul of the Securities Act of 1933. 346 U.S. 427, 438 (1953). However, this Court overruled *Wilko* in *Rodriguez de Quijas* because it concluded that the Securities Act (continued...)

B. This Court's decisions have evolved from considering text, legislative history, and statutory purpose to an exclusive focus on statutory text in applying the contrary congressional command test.

1. The contrary congressional command test originated as a method to reconcile the FAA with potentially conflicting federal statutes.

This Court confronted and began to develop its approach to the issue of how to reconcile the FAA and a potentially conflicting federal statute in *Mitsubishi Motors*, which involved federal antitrust claims that the parties had agreed to arbitrate. *Mitsubishi Motors*, 473 U.S. at 616-20. This Court held that agreements to arbitrate federal statutory claims must be enforced under the FAA "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 628. The Court explained that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible *from text or legislative history*." *Id.* (emphasis added).

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of 1933 does not contain a contrary congressional command overriding the FAA. 490 U.S. at 480-85.

McMahon presented the next opportunity for this Court to address this issue. That case involved claims by investors against a brokerage under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations (RICO) Act, which the parties had agreed to arbitrate. *McMahon*, 482 U.S. at 222-23. This Court reaffirmed that the FAA "mandates enforcement of agreements to arbitrate statutory claims." *Id.* at 226. However, it clarified that, "[l]ike any statutory directive," the FAA "may be overridden by a contrary congressional command." *Id.* The Court explained that, "[i]f Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history or from an inherent conflict between arbitration and . . . the statute's underlying purposes." *Id.* at 227 (citations omitted). The Court also placed "[t]he burden . . . on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* After finding no indication in the text or legislative history of the Securities Exchange Act of 1934 or the RICO Act that Congress intended to preclude arbitration of such claims, this Court concluded that nothing in the purposes behind those statutes conflicted with the FAA's mandate. *See also Rodriguez de Quijas*, 490 U.S. at 481-84 (applying same analysis to hold that the Securities Act of 1933 does not override FAA's mandate).

2. This Court has more recently shifted its focus from statutory purpose to statutory text in applying the contrary congressional command test.

This Court refined the contrary congressional command test in *Gilmer*, which involved the enforceability of an agreement to arbitrate an Age Discrimination in Employment Act (ADEA) claim. *Gilmer*, 500 U.S. at 23-24. *Gilmer* held that the ADEA did not contain a contrary congressional command overriding the FAA because "Congress . . . did not *explicitly* preclude arbitration or other nonjudicial resolution of claims" in the ADEA. *Id.* at 29 (emphasis added). While this Court also examined whether there was an inherent conflict between the purposes of the ADEA and the FAA, 500 U.S. at 26-27, its analysis marks the beginning of a shift away from consideration of inherent conflict between perceived statutory purposes and towards an exclusive focus on statutory text.

Of particular importance here, *Gilmer* rejected the plaintiff's argument that because the ADEA provided for class proceedings, enforcing a bilateral arbitration clause would not achieve the ADEA's purposes. *Gilmer* explained that "'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 32 (citation omitted). Furthermore, *Gilmer* clarified that "[m]ere inequality in bargaining

power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33.

The Court reinforced its increasing focus on statutory text in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251-53 (2009), which involved a collective bargaining agreement that included an agreement to arbitrate an ADEA claim. In enforcing this arbitration clause, the Court disagreed with Justice Stevens' dissenting view that the arbitration clause should not be enforced because the ADEA's purposes conflicted with arbitration:

> The *Gilmer* Court did not adopt Justice STEVENS' personal view of the purposes underlying the ADEA, for good reason: That view is not embodied within the statute's text. Accordingly, it is not the statutory text that Justice STEVENS has sought to vindicate—it is instead his own "preference" for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute.

Id. at 267 n.9; *see also id.* at 270 ("We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text. Absent a constitutional barrier, 'it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.'" (citation omitted)).

3. This Court has explicitly and exclusively focused on statutory text in its most recent cases applying the contrary congressional command test.

In *CompuCredit*, this Court made explicit what it had been signaling ever since *Mitsubishi Motors*: that the contrary congressional command test looks only to the other federal statute's text. *CompuCredit* involved claims under the Credit Repair Organizations Act (CROA), which the plaintiffs had agreed to arbitrate. *CompuCredit*, 565 U.S. at 96-97. The plaintiffs argued that several of the CROA's provisions constituted a contrary congressional command overriding the FAA's mandate. *Id.* at 98-100. Without mentioning the CROA's underlying purposes or its legislative history, this Court looked solely at the CROA's text for a contrary congressional command and rejected the plaintiffs' arguments, concluding: "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, . . . valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id.* at 100-01 (citation omitted).

Notably, *CompuCredit* provided the following examples of contrary congressional commands sufficient to override the FAA's mandate. *Id.* at 103-04. These examples show the specificity with which a contrary congressional command must appear in statutory text to override the FAA:

- 7 U.S.C. § 26(n)(2) (2012): "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

- 15 U.S.C. §1226(a)(2) (2012): "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

- 12 U.S.C. § 5518(b) (2012): "The [Consumer Financial Protection] Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."

In citing these examples, *CompuCredit* emphasized that, "[w]hen [Congress] has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *CompuCredit*, 565 U.S. at 103.

Most recently, this Court reaffirmed *CompuCredit*'s textual approach in *Italian Colors*, in which the plaintiffs argued that the federal antitrust laws amounted to a contrary congressional command overriding the FAA's mandate requiring the enforcement of plaintiffs' arbitral class action waiver. *Italian Colors*, 133 S. Ct. at 2308. Without examining statutory purpose or legislative history, the Court held that "[n]o contrary congressional command requires us to reject the waiver of class arbitration here" because "[t]he antitrust laws do not 'evinc[e] an intention to preclude a waiver' of class-action procedure" since "[t]he Sherman and Clayton Acts *make no mention* of class actions." *Id.* at 2309 (emphasis added).

This Court has followed the same path away from consideration of statutory purpose and toward exclusive focus on statutory text in other cases calling for interpretation of federal statutes or resolution of statutory conflict. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-88 (2001) (looking solely to statutory text to hold that private right of action could not be implied under Title VI of 1964 Civil Rights Act to sue for disparate impact, and condemning earlier cases that gave weight to congressional purpose in implied private right of action analysis); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 402-05 (2010) (condemning resort to legislative history and examining only statutory text in determining whether state statute conflicted with Federal Rule of Civil Procedure for *Erie* purposes).

C. Nothing in the NLRA's text contains a contrary congressional command overriding the FAA with the clarity this Court's cases require.

Applying this Court's strict textual approach here, the NLRA does not contain any language even approaching the clarity required of a contrary congressional command that could override the FAA.

The Seventh and Ninth Circuits and the NLRB below pointed to sections 7 and 8(a)(1) of the NLRA, 29 U.S.C. §§ 157, 158(a)(1), as creating a substantive right for employees to pursue wage-and-hour claims on a class or collective basis. Epic Pet. App. 3a-9a; E&Y Pet. App. 3a-11a; NLRB Pet. App. 17a-20a, 31a-33a, 38a-43a. But those provisions do not specifically mention arbitration, as required to constitute a contrary congressional command overriding the FAA's directive to enforce arbitration agreements according to their terms, including their arbitral class action waivers. *See Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 103-04. Section 7 merely protects employees' right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, while section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in" section 7, 29 U.S.C. § 158(a)(1).

This does not even come close to the level of specificity and clarity embodied in the statutes this Court pointed to in *CompuCredit*, 565 U.S. at 103-04, as sufficient for a contrary congressional command overriding the FAA. Indeed, both the CROA and the ADEA, at issue respectively in *CompuCredit*, *id.* at 107, and *Gilmer*, 500 U.S. at 32, specifically provided for class actions, but this Court did not hesitate to hold that these specific textual references to class proceedings were insufficient to displace the FAA's mandate. *See Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer*, . . . we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions. We said that statutory permission did '"not mean that individual attempts at conciliation were intended to be barred."'" (citations omitted)).

Nor does the NLRA's legislative history change this analysis. While *McMahon* referenced legislative history as a possible source for a contrary congressional command, *McMahon*, 482 U.S. at 227, this Court's exclusive focus on statutory text since *McMahon* demonstrates that mere legislative history unaccompanied by anything in the text of a statute is not a sufficient ground on which to base a contrary congressional command overriding the FAA, *see Italian Colors*, 133 S. Ct. 2309-10; *CompuCredit*, 565 U.S. at 103-04; *Pyett*, 556 U.S. at 267 n.9.

This development away from legislative history makes sense. In recent years, this Court has highlighted the frequent unreliability of legislative history as a guide to congressional intent. *See, e.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); *see also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176-77 (2014) (Scalia, J., concurring in principal part and concurring in the judgment) (laying out several flaws in the reliance on legislative history to interpret statutes).

In any case, nothing in the legislative history of sections 7 and 8(a)(1) of the NLRA even hints that Congress intended those provisions to override the FAA's mandate that arbitration agreements—including arbitral class action waivers—be enforced according to their terms. This is not surprising. Like the antitrust laws examined in *Italian Colors*, the NLRA was

> enacted . . . before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Italian Colors, 133 S. Ct. at 2309 (citation omitted); *accord D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361

(5th Cir. 2013) ("Congress did not discuss the right to file class or consolidated claims against employers," such that "the legislative history [of the NLRA] . . . does not provide a basis for a congressional command to override the FAA"); E&Y Pet. App. 37a (Ikuta, J., dissenting) ("The NLRA was enacted decades before Rule 23 created the modern class action in 1966.").

In short, nothing in the NLRA's text nor in its (irrelevant) legislative history amounts to a contrary congressional command overriding the FAA's mandate that the arbitral class action waivers here be enforced according to their terms.

CONCLUSION

For the foregoing reasons and for the reasons stated in Epic Systems', Ernst & Young's, and Murphy Oil USA's briefs on the merits, this Court should reverse the Seventh and Ninth Circuits' decisions in *Epic Systems* and *Ernst & Young*, affirm the Fifth Circuit's decision refusing to enforce the NLRB's ruling in *Murphy Oil*, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

HORVITZ & LEVY LLP
DAVID M. AXELRAD
Counsel of Record
FELIX SHAFIR
JOHN F. QUERIO
3601 West Olive Ave., 8th Fl.
Burbank, California 91505-4681
(818) 995-0800
daxelrad@horvitzlevy.com

DRI–THE VOICE OF THE DEFENSE BAR
JOHN E. CUTTINO
55 W. Monroe St., Ste. 2000
Chicago, Illinois 60603
(312) 795-1101
jcuttino@gwblawfirm.com

Counsel for *Amicus Curiae*
DRI–The Voice of the Defense Bar

June 16, 2017

RECORD
AND
BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300, 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION

v.

JACOB LEWIS

ERNST & YOUNG LLP, ET AL.

v.

STEPHEN MORRIS, ET AL.

NATIONAL LABOR RELATIONS BOARD

v.

MURPHY OIL USA, INC., ET AL.

On Writ Of Certiorari
To The United States Courts Of Appeals
For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICUS CURIAE* THE EMPLOYERS GROUP IN SUPPORT OF PETITIONERS IN NOS. 16-285 & 16-300 AND RESPONDENT MURPHY OIL IN NO. 16-307

GEORGE S. HOWARD, JR.
JONES DAY
12265 El Camino Real
Suite 200
San Diego, CA 92130

STEVEN ZADRAVECZ
JONES DAY
3161 Michelson Dr.
Irvine, CA 92612

BETH HEIFETZ
Counsel of Record
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
bheifetz@jonesday.com

Counsel for Amicus Curiae *The Employers Group*

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STATEMENT OF INTEREST

The Employers Group, a California non-profit organization, is one of the nation's oldest and largest human-resources management organizations for employers. It represents nearly 3,500 California employers of all sizes and every industry, which collectively employ nearly 3 million employees. The Employers Group also provides live helpline assistance, online resources and tools, and in-company human-resources consulting services and support to its members. As part of its mission, the Employers Group seeks to enhance the stability, predictability, and fairness of the laws and decisions regulating employment relationships. Many members of the Employers Group have adopted arbitration agreements and programs as a method to resolve employment disputes promptly, fairly, and with far less expense and delay than required for court adjudication of such matters. The Employers Group thus has a direct interest in the correct interpretation and application of both the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).[1]

---

[1] Counsel of record for all parties have consented in writing to the filing of this brief.

No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief.

SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) protects the right of parties to make and enforce agreements to arbitrate on an individual basis instead of a class or collective basis. Accordingly, as this Court has recognized, the FAA requires the enforcement of "class-action waivers" contained in arbitration agreements, and any obstacle to the enforcement of such waivers is "inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

The National Labor Relations Act (NLRA) does not disturb the FAA's protection of individual arbitration rights. Because the NLRA was enacted after the FAA, it must be interpreted in light of the venerable canon against implied repeals, which holds that a later-enacted statute cannot repeal any part of an earlier statute unless Congress has given some clear indication of its intent to effectuate the repeal. The NLRA does not contain any such clear indication. It does not even mention the issue of arbitration or class litigation, much less create a *non-waivable* right to class litigation in derogation of the right to make and enforce individual arbitration agreements under the FAA.

Because Congress did not supply the requisite clear intent, the National Labor Relations Board cannot repeal the FAA's protection of individual arbitration rights by administrative fiat. Administrative agencies, no less than courts, are bound by the canon against implied repeals. Thus, in the absence of clear authorization from Congress, the Board cannot promulgate an administrative interpretation that would repeal any part of the FAA.

ARGUMENT

I. The NLRA Does Not Displace the FAA's Protection of Individual Arbitration Rights

The NLRA was enacted in 1935, and for the next 80 years "no court decision" ever "held that the Section 7 right to engage in 'concerted activities' . . . prohibited class action waivers in arbitration agreements." *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 356 (5th Cir. 2013). To the contrary, the NLRA was enacted against the backdrop of the FAA, which affirmatively *protects* the right of individual arbitration: The FAA gives parties the right to enter and enforce agreements to arbitrate on an individual basis by mutually agreeing to a "class-action waiver." *Concepcion*, 563 U.S. at 340. Accordingly, any refusal to enforce such an individual arbitration agreement is "inconsistent with the FAA." *Id.* at 344.

The year after this Court recognized the protection of individual arbitration rights under the FAA in *Concepcion*, however, the National Labor Relations Board sought to undermine that decision by announcing a novel reinterpretation of the NLRA, which carried sweeping implications for every employer in the country: It proclaimed that, "notwithstanding the [FAA]," agreements to arbitrate on an individual basis (and waiving the right to proceed on a class basis) are now prohibited in any employment contract involving interstate commerce. *In Re D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). In other words, despite the fact that individual arbitration agreements have long been a common feature of the American employment landscape, have been enforced for decades by this

Court and others, and enjoy pre-existing statutory protection under the FAA, the Board suddenly declared that such agreements have been illegal for eight decades—without anyone ever noticing before.

The Board's attempt to eliminate the FAA's protection of individual arbitration rights must be rejected because it violates the venerable canon against the "implied repeal of statutes," which serves the dual values of "stability and predictability" in the law. *Hammon v. Barry*, 826 F.2d 73, 80 (D.C. Cir. 1987). Under this canon, a federal statute such as the NLRA cannot be construed to displace any part of an "earlier" statute such as the FAA unless it contains a "clearly expressed congressional intention" to effectuate the repeal. *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). This is a "relatively stringent standard," which is "rar[ely]" satisfied. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996).

The NLRA does not provide the type of "clear" indication necessary to repeal the FAA's protection of individual arbitration rights. The NLRA refers generally to "concerted activities" among a wide range of other subjects, but says nothing about arbitration or class litigation. As a result, the NLRA must be read to coexist with the FAA's right to make and enforce individual arbitration agreements, not to displace it.

A. The FAA Protects The Right Of Parties To Make And Enforce Individual Arbitration Agreements

The FAA protects the right of parties to make and enforce agreements to arbitrate on an individual basis by mutually consenting to a "class-action

waiver." *Concepcion*, 563 U.S. at 344. Accordingly, as this Court has recognized, "invalidating private arbitration agreements denying class adjudication, would be an abridgment . . . of [the] substantive right" to make and enforce individual arbitration agreements under the FAA. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309–10 (2013) (alteration omitted).

This conclusion follows directly from *Concepcion*, which squarely held that refusing to enforce a "class-action waiver" in an arbitration agreement is "inconsistent with the FAA." 563 U.S. at 344. Where the parties have agreed to arbitrate on an individual basis, the imposition of class proceedings "interferes with fundamental attributes of arbitration." *Id.* As *Concepcion* explained, the entire "point" of the FAA is "to allow for efficient, streamlined procedures," which "reduc[e] the cost and increas[e] the speed of dispute resolution." *Id.* at 344–45. Such "streamlined procedures" are possible in individual arbitration, but "imposing *class* procedures" would "sacrifice[] the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 344, 347–48 (emphasis added).

Moreover, the lack of appellate review in arbitration makes it "poorly suited to the high[] stakes of class litigation," where "damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once." *Id.* at 350. Without appellate review of a collective damages award, "the risk of an error" becomes "unacceptable," which effectively precludes arbitration as a viable option: few if any defendants will choose to "bet the company

with no effective means of review." *Id.* at 350–51. As a result, giving defendants the choice of arbitrating only on a *class* basis is really no choice at all, and it effectively precludes arbitration as a meaningful option.

At the same time, *Concepcion* specifically held that the FAA's savings clause, 9 U.S.C. § 2, does not alter this conclusion. Because the FAA's affirmative provisions *presuppose* the availability of individual arbitration, it would be "absolutely inconsistent" to read the savings clause to authorize a *ban* on individual arbitration. *Concepcion*, 563 U.S. at 343. In other words, the savings clause "cannot in reason be construed" to allow the imposition of class proceedings in contravention of a class waiver, because that would violate the basic principle that "the [statute] cannot be held to destroy itself." *Id.* (citation omitted).

Because the FAA protects the right to make and enforce arbitration agreements containing class-action waivers, any rule prohibiting the enforcement of such waivers would conflict directly with the FAA. Indeed, in *Concepcion*, the conflict was sufficiently clear for the FAA to preempt the law of a *sovereign state*, even though such preemption can occur only if there is a "clear and manifest" conflict between state and federal law. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Accordingly, there can be no doubt that interpreting the NLRA to prohibit individual arbitration agreements would equally create a "square and manifest" conflict with the FAA.

By holding to the contrary, the Seventh and Ninth Circuits flatly defied *Concepcion*: The Ninth Circuit

held that the Board's interpretation of the NLRA as prohibiting individual arbitration agreements creates "no inherent conflict [with] the FAA," *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 987 n.13 (9th Cir. 2016), and the Seventh Circuit likewise found "no conflict." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016). But neither court explained how this "no conflict" theory makes any sense given *Concepcion*'s holding that banning individual arbitration agreements is "inconsistent with the FAA." 563 U.S. at 344. No explanation is possible, other than outright defiance of *Concepcion*.

B. The NLRA Does Not Contain the Requisite Clear Indication to Repeal the FAA's Protection of Individual Arbitration Rights

"Like any statutory directive," the FAA's protection of individual arbitration "may be overridden by a contrary congressional command." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). But in order for the FAA's protection of individual arbitration to be repealed, "the intention of the legislature . . . must be clear and manifest." *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). As this Court has repeatedly emphasized, this is a "stringent standard" that is "rar[ely]" satisfied. *Matsushita*, 516 U.S. at 381 (1996). There is no mistaking the level of clarity that this Court has required: the conflict must be "clear and manifest," *Watt v. Alaska*, 451 U.S. 259, 267 (1981), "clearly expressed," *Morton*, 417 U.S. at 551, and "irreconcilable," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) ("irreconcilable"); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939)

("clear and manifest"). Under this stringent standard, this Court "will not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (alterations omitted).

Importantly, the canon against implied repeal is sensitive to the order of statutory enactments, as one of its purposes is to avoid displacing "earlier" statutes, thereby lending stability to the law and protecting reliance interests. *Morton*, 417 U.S. at 550. The canon also recognizes that it is even more difficult for "specific" statutory provisions to be "controlled or nullified" by the later enactment of more "general" provisions. *Id.* at 550–51.

In the specific context of the FAA, this Court has consistently applied the rule that subsequent statutes must speak with "clarity" in order to displace the FAA's requirement that arbitration agreements be enforced "according to [their] terms." *CompuCredit Corp. v. Greenwood*,, 565 U.S. 95, 104 (2012). Unless a statute contains a "contrary congressional command" that overrides the FAA, the statute must be read to comport with the FAA. *Italian Colors*, 133 S. Ct. at 2309. Thus, for example, this Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions." *Id.* at 2311 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Although the statute at issue in *Gilmer* (the ADEA) expressly conferred a right to collective

action, it gave no indication that this was a *non-waivable* right, and thus it was not sufficiently clear to override the FAA's policy that individuals must be left free to enter agreements to arbitrate on an individual basis.

These principles are dispositive here. The NLRA easily can be read to coexist with individual arbitration agreements, and indeed that is the way everyone always *did* read the statute from its enactment in 1935 until the Board decided *D.R. Horton* in 2012.

At the outset, the NLRA does not mention the procedural mechanism of class litigation, and the term "concerted activities" can be read in any number of ways that have nothing to do with class actions. The term most naturally refers to activities directly related to unionization and collective bargaining, which are the NLRA's clear focus. An employee's agreement to arbitrate individually does not remotely "impede" employees' efforts to unionize, "to bargain collectively," or to engage in like activities, which is what the NLRA protects. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334 (1944). The Board's contrary reading would dramatically expand the reach of the NLRA to encompass the procedural right of class litigation without any connection to organizing or bargaining activity, contrary to the way the statute has been understood for eight decades.

Moreover, even assuming the NLRA could be reinterpreted to create a novel "right" to class-action proceedings, the statute contains no clear indication that this hypothetical right would be non-waivable. Indeed, even if the right were non-waivable *outside* of

arbitration, the FAA provides that class-action rights are presumptively waivable *in the specific context of arbitration agreements*. Thus, even when federal law *expressly creates* a right for plaintiffs to use a "class mechanism," the Supreme Court has "rejected th[e] proposition" that this right is "nonwaivable . . . in arbitration." *Italian Colors*, 133 S. Ct. at 2310; *see also Gilmer*, 500 U.S. at 32 ("[T]he fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). The same conclusion has even greater force here, where the NLRA does not even *mention* class-action rights, much less clearly override the FAA's specific rule that such rights can be waived in arbitration agreements. To the contrary, the NLRA indisputably allows individual employees to opt out of class actions, and it would be anomalous to treat arbitration agreements as a disfavored *means* of opting out.

For these reasons, it is highly doubtful that the NLRA even *can* be read to prohibit agreements to arbitrate on an individual basis. But in any event, it certainly does not contain the type of "clear and manifest" indication that would be necessary to overcome the *protection* that such agreements enjoy under the FAA. *Posadas*, 296 U.S. at 503.

It is instructive to compare the NLRA to another recently enacted statute that contains a far clearer indication of congressional intent to cut back on arbitration rights. As part of the Dodd-Frank Act of 2010, Congress specifically authorized the Consumer Protection Financial Bureau (CFPB) to "prohibit or impose conditions or limitations on" certain

"agreements providing for arbitration" involving consumer financial services. 12 U.S.C. § 5518(a), (b). Pursuant to that specific statutory authority, the CFPB has now issued a proposed rule that would prohibit the use of class-action waivers in covered arbitration agreements. *See* NPRM, 81 Fed. Reg. 32,830 (May 24, 2016). This illustrates how Congress can act with far greater clarity to impose new limits on arbitration rights. It contrasts starkly with the NLRA, which says nothing about imposing any "prohibit[ions]" or "limitations" on any arbitration agreement.

C. *Chevron* Deference Does Not Apply To Agency Interpretations That Would Repeal Prior Federal Law

Both the Ninth Circuit and the Seventh Circuit further erred by concluding that the Board is entitled to *Chevron* deference in interpreting the NLRA to prohibit individual arbitration agreements. *See Lewis*, 823 F.3d at 1153; *Morris*, 834 F.3d at 983 n.5 (stating that the Board's interpretation of the NLRA merits deference because it "is a permissible construction" of the statute). The Seventh Circuit held that "[t]he Board's interpretation is, at a minimum, a sensible way to understand the statutory language, and thus we must follow it." *Lewis*, 823 F.3d at 1153. Then, in order to "harmonize the FAA and NLRA," the court held that "the FAA's saving clause" must be read to accommodate the Board's view of the NLRA. *Id.* at 1157–59.

This reasoning is exactly backwards because it requires the FAA *statute* to give way to an *agency interpretation*. On multiple occasions, this Court has

made clear that agencies are bound to follow statutes, not the other way around. Consequently, in order to be faithful to this Court's decisions, the Board's interpretation of the NLRA must be *constrained* by the FAA, and cannot be transformed into an authoritative basis to *displace* the FAA.

To determine whether an agency interpretation is entitled to any deference, courts must first "apply[] the normal 'tools of statutory construction'" to determine whether the agency has any latitude to construe the statute. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). *See also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304 (2003) (recognizing that interpretive rules "circumscribe[]" the realm of "permissible [agency] action" under *Chevron*). Here, the dispositive "tool of statutory construction" is the canon against implied repeals: because the NLRA contains no clear indication that the NLRA was intended to displace the FAA's protection of individual arbitration agreements, the Board is not permitted to achieve that result by administrative fiat.[2]

---

[2] Multiple circuits, including the Ninth Circuit itself, have recognized the same basic point: Where "the presumption[] . . . against implied repeals remove[s] any potential ambiguity that an agency might otherwise resolve, *Chevron* deference has no role to play." *Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1075 (9th Cir. 2010). No "deference may be accorded to an agency's view" of whether "one statutory scheme supersedes the other." *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir.

Applying the same logic, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Accordingly, this case provides an opportunity for this Court to reaffirm the crucial importance of the major-questions doctrine in constraining the overreach of the NLRB. As this Court has long recognized, "[d]eference to the Board cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress." *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (ellipsis in original); *see generally King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (warning against agency deference on "question[s] of deep economic and political significance"). That principle

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(continued...)

2003) (citation omitted). *See also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1374 (Fed. Cir. 2005) (Dyk, J., dissenting) (A "policy-driven interpretation under *Chevron* cannot override the clear command of a conflicting statute"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) ("Rules of interpretation bind all interpreters, administrative agencies included.").

applies directly here, where the Board has attempted to revolutionize the entire field of workplace relations by suddenly, for the first time in 80 years, reinterpreting the NLRA to prohibit individual arbitration agreements in virtually every employment relationship in the country. Putting aside the inherent implausibility of such a significant prohibition lying dormant in the NLRA for eight decades, such a sweeping policy change cannot and should not be imposed at the unilateral discretion of the executive branch.

II. California Employers Have an Especially Acute Interest In Combating the Growing Trend of Judicial Hostility to Arbitration

California employers have suffered uniquely from the recurring pattern of judicial hostility to arbitration in defiance of the FAA. This hostility is reflected in, among other things, this Court's reversal of several California decisions and statutes refusing to enforce arbitration agreements under the FAA. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015); *Concepcion*, 563 U.S. at 341; *Preston v. Ferrer*, 552 U.S. 346 (2008); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also* Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L. J. 39, 54, 66 (2006).

This Court's decision in *Concepcion* has been a special target of defiance in California. Most recently in *Imburgia*, this Court admonished a California appellate court that while "[l]ower court judges are

certainly free to note their disagreement with a decision of this Court," they may not "refus[e] to recognize [its] superior authority." 136 S. Ct. at 468. "*Concepcion* is an authoritative interpretation of [the FAA]," and, "[c]onsequently, the judges of [lower courts] must follow it." *Id.* "The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation." *Id.*

Another example of the defiance of *Concepcion* is the recent decision of the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert denied*, 135 S. Ct. 1155 (2015). In that case, the court announced a new, non-waivable right to bring "representative" actions under the California Private Attorney Generals Act (PAGA). This is a clear end-run around *Concepcion* because it authorizes private class counsel to disregard agreements to arbitrate on an individual basis and instead seek mass awards for alleged class-wide violations of the California Labor Code. Even more distressingly, a divided panel of the Ninth Circuit recently *agreed* with *Iskanian*'s anti-arbitration holding, thus joining in the effort to undermine *Concepcion*. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015). (A petition for certiorari raising the *Iskanian/Sakkab* issue is now pending before this Court in *Bloomingdale's, Inc., v. Vitolo*, No. 16-1110.)

California employers have for years struggled to enforce valid arbitration agreements in the face of an ingenious array of "devices and formulas" erected by California state judges and legislators intent on ignoring this Court's jurisprudence. *Concepcion*, 563

U.S. at 342. But now, alarmingly, the Ninth Circuit too has begun subverting employers' federal arbitration rights. This is not just a problem for California, but for the entire national economy: Like the employers in these consolidated cases, many California-based employers do business nationwide or in multiple states, and are thus subject to differing outcomes when seeking to enforce their arbitration agreements in different circuits. Other national and international employers also have a significant portion of their workforce in California, and thus have no choice but to contend with the anti-arbitration animus of the California courts. Accordingly, vindicating the FAA's protection of individual arbitration rights here will send a much-needed message to both state and federal judges in California that this Court will continue to enforce the authority of its FAA precedents with a vigilant eye.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments in *Epic* and *Ernst & Young*, and affirm the judgment in *Murphy Oil*.

Respectfully submitted,

GEORGE S. HOWARD, JR.
JONES DAY
12265 El Camino Real
Suite 200
San Diego, CA 92130

STEVEN ZADRAVECZ
JONES DAY
3161 Michelson Dr.
Irvine, CA 92612

BETH HEIFETZ
Counsel of Record
ANTHONY J. DICK
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
bheifetz@jonesday.com

June 2017

Counsel for Amicus Curiae *The Employers Group*

ECORD
AND
BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-285

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae* Equal Employment Advisory Council

June 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 16-285

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment nondiscrimination laws. This commitment extends to the prompt and effective resolution of employment disputes using arbitration and other forms of alternative dispute resolution. Many of them thus have adopted company-wide policies requiring the use of binding arbitration to resolve all employment-related disputes. Some of those arbitration agreements contain class action waiver provisions, which primarily are designed to preserve the benefits of arbitration, while at the same time avoiding costly, complex, and protracted class-based litigation. The issues presented in this case thus are extremely important to the nationwide employer constituency that EEAC represents.

Agreements to arbitrate, like other privately negotiated contracts, afford parties to a dispute the right to

establish clear standards and criteria against which their future conduct will be judged. Accordingly, such agreements must be strictly enforced in the same manner and to the same extent as any other valid contract. Disregarding these well-established legal principles, the Seventh Circuit below incorrectly held that an agreement requiring employees to submit their work-related disputes to binding arbitration as a condition of employment, but which contains a clause barring class-based or collective claims, impermissibly restricts the right of employees to engage in protected concerted activity for their "mutual aid and protection," in violation of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*

Because of its interest in this subject, EEAC has filed *amicus curiae* briefs supporting the enforceability of arbitration agreements in numerous cases before this Court, including *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *MHN Gov't. Svcs., Inc. v. Zaborowski*, 136 S. Ct. 1539 (2016) (cert. dismissed); and *Bloomingdale's, Inc. v. Vitolo*, No. 16-1110 (brief *amicus curiae* filed

Apr. 14, 2017). EEAC is thus deeply familiar with the issues presented in this case and is well situated to brief the Court on their importance beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Jacob Lewis worked for Petitioner Epic Systems Corporation (Epic) as a technical writer. Pet. App. 24a. In April 2014, Epic sent an email to staff advising that the company would now require that all wage and hour disputes be submitted to binding, individual arbitration. *Id.* at 2a. The agreement contained an express clause barring class, collective, and representative proceedings, which specified that if the class waiver were ever deemed unenforceable, any class-based claim would have to be brought in court. *Id.* Employees were required to agree as a condition of employment. *Id.*

Sometime thereafter, Lewis sued Epic in federal court, accusing the company of misclassifying him and others similarly situated as exempt in violation of the Fair Labor Standards Act (FLSA). *Id.* Pointing to the agreement to arbitrate, Epic moved to dismiss the action and to compel individual arbitration of Lewis's claims. *Id.* Lewis responded that the arbitration agreement was unconscionable and thus unenforceable. *Id.* at 2a-3a. Alternatively, he contended that the class waiver provision impermissibly interfered with the right of employees to engage in protected concerted activities under the NLRA, and therefore was unlawful. *Id.* at 3a.

Deferring to the NLRB's position on the question, the trial judge held that the class waiver was inconsistent with the NLRA's "concerted activity" protections. *Id.* It found there to be no conflict with

the FAA, because the FAA does not mandate enforcement of arbitration agreements that "conflict with substantive provisions" of other federal laws, like the NLRA. *Id.* at 27a. Therefore, the trial court refused to dismiss Lewis's court claim and order him into arbitration. *Id.* at 28a-29a.

Epic appealed to the Seventh Circuit, which affirmed. *Id.* at 2a. Like the trial court, the appeals court adopted the Board's view that class waivers impermissibly interfere with employee Section 7 rights, and therefore are unenforceable under the NLRA. *Id.* at 23a. Epic filed a petition for a writ of certiorari with this Court on September 2, 2016. The Court granted certiorari on January 13, 2017.

SUMMARY OF ARGUMENT

This Court consistently has held that under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, agreements to arbitrate must be enforced as written. This pro-arbitration mandate applies equally to agreements containing explicit class and collective action waivers, as well as to those that do not address the availability of such procedures. That is because allowing arbitrable claims to be adjudicated on a class or collective basis where the parties have not expressly so agreed "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Disregarding the strong federal policy expressed in the FAA favoring enforcement of arbitration agreements, the Seventh Circuit instead applied a controversial National Labor Relations Board (NLRB or Board) rule, which strongly *disfavors* arbitration, to invalidate Petitioner's arbitration agreement simply

because it contained a class action waiver. According to the Board, an arbitration agreement that restricts the availability of class or collective procedures impermissibly interferes with the right of employees to engage in protected concerted activity for their "mutual aid and protection" under Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. Because the decision below, as well as the NLRB policy position on which it is based, cannot be reconciled with sound and established FAA principles, it is erroneous and must be reversed.

The FAA provides that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Its primary objective is to ensure that arbitration agreements are rigorously enforced "in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted). For that reason, where an arbitration agreement contains an express class or collective action waiver – or does not explicitly *authorize* such procedures – the agreement must be enforced as written. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, (2011); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010).

Contrary to the Board's view, waiving a party's access to class procedures is not tantamount to a waiver of any substantive rights, including the Section 7 right to engage in protected concerted activities. This Court long ago held in *Gilmer v. Interstate/ Johnson Lane Corp* that when an individual agrees, as a condition of employment, to submit all employment-related disputes to arbitration, that agreement stands

"upon the same footing as other contracts" and is enforceable with respect to substantive discrimination claims as well as other disputes. 500 U.S. 20 (1991) (citations omitted).

In addition, enforcement of a class waiver implicates an individual's ability to utilize certain procedures, *not* the substantive right to engage in protected concerted activities itself, a principle confirmed by this Court in *Gilmer*. Accordingly, any suggestion that a class or collective action waiver prevents the exercise of protected concerted activity is belied by this Court's longstanding FAA jurisprudence since and including *Gilmer*.

Furthermore, the NLRA does not establish a non-waivable right to class or collective proceedings; accordingly, enforcing a class waiver pursuant to the FAA does not conflict with any contrary mandate expressed in the NLRA. *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1427 (2017). Moreover, because the Board's *D.R. Horton* rule – on which the court below relied – does not reflect a reasonable interpretation of the NLRA, is inconsistent with the Board's own longstanding views, and in fact exhibits the very hostility towards arbitration that this Court long ago rejected, it is not entitled to any judicial deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citations and quotations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015).

In *Concepcion*, this Court once again made clear that rules imposing burdens on arbitration agreements that do not exist for other types of contracts are incompatible with, and thus displaced by, the FAA.

D.R. Horton is such a rule. In addition to contravening the strong federal policy favoring arbitration, it also undermines most, if not all, of the practical benefits that inure to employers and employees alike by agreeing to arbitrate workplace disputes. For employees, the speed of resolving disputes via individual arbitration can be particularly advantageous, especially for those who will continue their employment well after their claims have been addressed. For employers, the well-recognized practical and financial advantages to arbitration are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

ARGUMENT

I. THE *D.R. HORTON* RULE ENDORSED BY THE COURT BELOW CANNOT BE RECONCILED WITH THE PLAIN TEXT OF THE FAA AND THIS COURT'S REPEATED ADMONITION THAT ARBITRATION AGREEMENTS ARE TO BE ENFORCED IN ACCORDANCE WITH THEIR TERMS

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, is the "primary substantive provision" of the Act. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

This Court has described this provision as "reflecting both a 'liberal federal policy favoring arbitration,'" *Concepcion*, 563 U.S. at 339 (citation omitted), and the "'fundamental principle that arbitration is a matter of contract.'" *Id.* (citation omitted); *see also Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97-98 (2012). Indeed, a principal aim of the FAA is to construe private arbitration agreements in accordance with the parties' desires and expectations. "[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). To the contrary, courts are to "rigorously enforce agreements to arbitrate . . . in order to give effect to the contractual rights and expectations of the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (citations and internal quotations omitted).

A. The Mere Existence Of A Class Action Waiver Does Not Render An Arbitration Agreement Unenforceable

This Court has spoken directly to the enforceability of mandatory arbitration agreements that do not authorize the parties to bring claims on a class-wide basis. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Court held that imposing class arbitration on parties who have not expressly agreed to authorize such procedures is inconsistent with the FAA. The Court reinforced that principle in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), invalidating a California state law that imposed heightened enforceability standards on mandatory arbitration agreements containing express class action waiver provisions. Reaffirming the strong public policy favoring arbitration, the Court in *Concepcion* said that efforts to impose class arbitration on parties who have not expressly agreed to such procedures "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344.

Subsequently, the Court in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), confirmed the validity of class action waivers contained in arbitration agreements, even where the costs associated with individual arbitration (or the perceived procedural limitations associated with it) may make arbitration less desirable to one side or the other. The basic premise on which those rulings rests is that class action procedures tend to interfere with the hallmarks of arbitration – including swift and cost-effective resolution – such that they may not be imposed on the parties in the absence of a clear contractual basis for doing so.

And yet the Seventh Circuit below, relying on a flawed policy argument derived from the NLRB's decision in *D.R. Horton*, "did exactly what *Concepcion* barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement–namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1427. Because the rule on which the decision below is based purports to apply national labor law in a manner that effectively precludes enforcement of *all* bilateral employment arbitration agreements, it is contrary to the FAA as construed by this Court, and therefore should be reversed.

B. Waiving Access To Certain Procedural Devices, Like Class Or Collective Action, Is Not Akin To Waiving The Substantive Right To Engage In NLRA-Protected Concerted Activities

1. Arbitration is an effective, if not preferable, means of vindicating substantive rights

Respondent contends that class and collective action waivers are categorically unlawful because they prevent employees from exercising their Section 7 right to engage in protected concerted activities for their "mutual aid or protection." Pet. App. 8a, 21a; *see also D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *overruled by D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). But the waiver in question neither explicitly nor implicitly imposes such a restriction; it merely calls for disputes arising from those rights to be resolved on an individual basis in an arbitral, instead of a judicial, forum. Respondent and the Board purport to equate the availability of class procedures with the substantive right to engage in

concerted activities for the "mutual aid or protection" of employees. Such an assertion is essentially the same as arguing that denying access to class procedures is equivalent to precluding vindication of the right to be free from workplace discrimination – a notion disabused by this Court long ago in *Gilmer*.

The substantive right created by Section 7 is to engage in protected concerted activities by whatever *permissible* means – including, but not limited to, class or collective action. *Gilmer* makes clear that an individual may waive the right to bring substantive claims on a collective basis, and that doing so is not the same as waiving the substantive right itself.

Thus for employees subject to agreements containing class waivers, that particular means for engaging in concerted activity is not available to them. They are not prevented from engaging in such activity via other means, however, as the Board has readily acknowledged in other contexts. Accordingly, any suggestion that a class or collective action waiver prevents "employees from taking *any* concerted legal action," *NLRB v. Alt. Entm't, Inc.*, __ F.3d __, 2017 WL 2297620, at *4 (6th Cir. May 26, 2017) (emphasis added) (citation omitted), is belied by this Court's settled FAA jurisprudence, beginning with *Gilmer*.

2. The NLRA does not confer a nonwaivable right to class or collective proceedings

Moreover,

> [t]he NLRA, all agree, does not create an express exemption from the FAA or expressly prohibit class-action waivers by name, not when the NLRA was first enacted in 1935 and not through any subsequent amendments to it. In view of [this

> Court's] FAA decisions over the last several years, that should end this case. Nor does the NLRA indirectly create an exception to the FAA.

Alt. Entm't at *14. (Sutton, J., concurring in part and dissenting in part).

In other words, the NLRA does not give employees a right to *class* or *collective* action; rather, employees have the right to engage in concerted activities, among them participation in class or collective proceedings where those procedures are available. In fact, the general availability of class action procedures typically is conditioned upon the satisfaction of several important preconditions. For instance, "[e]mployees cannot 'mutually contrive or agree' to litigate as a class, or even to join their claims. A judge or arbitrator makes the decision to group claims together based on the procedural rules of the forum." *Id.* at *15.

However, "[e]mployees participating in a litigation campaign are still 'joined together in order to achieve common goals' even if their claims are kept separate." *Id.* (citation omitted). Therefore, waiving the right to access certain procedural devices, like class or collective action, is not the equivalent of waiving the substantive right under Section 7 to engage in concerted activity for the mutual aid or protection of employees. Filing a class action is simply one possible means of engaging in protected concerted activity, just as an individual's act of posting a Facebook comment critical of working conditions or standards, which the Board itself has characterized as falling within Section 7's protections. *See, infra*, at II.C.

As one commentator has observed:

> Preliminarily, a semantic problem plagues the terms "concerted activities" and "class" or "collective" actions. Despite some linguistic similarity, these terms are neither synonymous nor equivalent. In their respective statutory schemes, the terms have quite different meanings, and using them interchangeably bespeaks a logical and legal fallacy. Employees have a § 7 right to act concertedly to file and try to prosecute lawsuits and grievances on a class or non-class basis to improve their lot as employees, but they have no more of a § 7 right to prevail on the class certification or class grievance issue than they have to win on the merits. More specifically, employees who sign *Gilmer*-authorized arbitration agreements that ban litigation, including class litigation as well as class grievances, have no § 7 right to a ruling by a court or arbitrator that they may maintain such class-based actions whenever they are pursued concertedly.

Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 91 (2011) (footnotes omitted).

Because the NLRA does not establish a substantive right to class or collective action, it follows that a class or collective action waiver is not unlawful. Therefore, even assuming the court below was correct in concluding the FAA's savings clause applies, Brief of Petitioner at 19-20, it could not be invoked to invalidate the agreement on that basis. As this Court observed earlier this Term, "A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that

derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (citation omitted).

II. PROPERLY CONSTRUED, THERE EXISTS NO INHERENT CONFLICT BETWEEN THE NLRA AND THE FAA

A. The FAA Expresses A Strong Federal Policy Favoring Individual Arbitration

Where the parties to an arbitration agreement have expressly waived the availability of certain procedures, such as class or representative arbitration, the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted). As this Court observed in *Gilmer*, "'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, agreements to arbitrate on an individual basis must be enforced as necessary to effectuate the FAA's policy goals and objectives.

The court below invalidated the agreement in question simply because it imposed a restriction on class-based proceedings. Such a result is directly at odds with the unequivocal pro-arbitration federal policy reaffirmed repeatedly by this Court over the last quarter-century, on which American businesses increasingly have relied in crafting their own dispute resolution strategies.

In particular, two major developments occurred in 1991 that had a profound impact on the use of binding arbitration in the employment context. First, this Court ruled in *Gilmer* that statutory discrimination claims brought under the Age Discrimination in Employment Act (ADEA) can be subject to binding arbitration. 500 U.S. at 35. Pointing out that the main purpose of the FAA was to "reverse the long-standing judicial hostility to arbitration agreements," *id.* at 24, it noted that by choosing arbitration, parties do not give up their substantive rights, but rather elect to have their claims heard in an arbitral forum instead of a court.

Next, Congress enacted the 1991 Civil Rights Act (CRA), which among other things amended Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, to provide for a right to jury trial, and to obtain statutory compensatory and punitive damages, as well as attorney's fees. At the same time, the CRA expressly encouraged the use of alternative dispute resolution mechanisms, including arbitration, leading more private sector employers to implement such programs as a means of reducing the time and increasing costs required to resolve EEO claims.[2]

Since *Gilmer*, this Court has resolved many cases involving scope of the FAA and the validity of employment arbitration. In *Circuit City Stores, Inc. v. Adams*, the Court expressly acknowledged the benefits of arbitration in the employment context, including the significant cost and time savings as compared to litigation. 532 U.S. 105 (2001). Then in 2002, the Court in *EEOC v. Waffle House, Inc.* again made clear

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[2] Pub. L. No. 102-166, § 118, codified as 42 U.S.C. § 1981 note (Alternative Means of Dispute Resolution).

that binding arbitration is a valid means of resolving employment disputes. 534 U.S. 279 (2002). Since that time, the Court has consistently endorsed the use of arbitration as an alternative to litigation in other contexts as well.

B. Nothing In The NLRA's Plain Text Evinces A Congressional Intent To Preclude Individual Arbitration

A clause contained in an arbitration agreement that precludes class actions is invalid only if Congress intended to create a non-waivable right to class procedures under the statute in question. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100 (2012); *see also Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004). The mere inclusion of language referencing a private right of action, for instance, will be insufficient to make such a showing. As this Court pointed out in *CompuCredit Corp. v. Greenwood*:

> It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish the "contrary congressional command" overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law.

565 U.S. at 100-01 (citation omitted). Thus, it is not enough merely to show that a statute specifically contemplates and encourages class actions. Rather, a party seeking to avoid a class action waiver must establish that Congress actually intended to prevent

parties from waiving the availability of class procedures.

Where a federal statute's plain text or legislative history does not preclude individual arbitration, the party opposing arbitration must demonstrate that an "inherent conflict" exists between arbitration and the statute in question. *Gilmer*, 500 U.S. at 26; *see also CompuCredit*, 565 U.S. at 109 ("If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes") (Sotomayor, J., concurring) (citation omitted). Neither Respondent below, nor the Board in *D.R. Horton*, made such a showing. To the contrary, "[h]aving worked in tandem with arbitration agreements in the past, [it is evident that] the NLRA has no inherent conflict with the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013).

Because Congress failed to include in the NLRA a non-waivable right to class or collective procedures, the Board in *D.R. Horton* was without legal authority to declare class action waivers – applicable to any number of workplace issues including, but not limited to, those implicating Section 7 – categorically unlawful. And by embracing the Board's policy position, the Seventh Circuit below acted in plain disregard of the FAA's command that arbitration agreements be enforced according to their terms – including those limiting the availability of class procedures.

C. The Board's Contrary Interpretation Is Not Entitled To Any Judicial Deference

In judging the arbitration agreement in the instant case to be an unlawful restraint on employee rights under Section 7 simply because it contained a class

waiver provision, the Seventh Circuit disregarded this Court's settled FAA jurisprudence, and instead embraced a controversial, legally unsupportable policy position invented by the NLRB in *D.R. Horton* just a few years ago. Because the Board's new position does not reflect a reasonable interpretation of the NLRA, is inconsistent with its own longstanding views, and in fact exhibits the very hostility towards arbitration that this Court long ago rejected, it is not entitled to any judicial deference.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citations and quotations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991); *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citation omitted); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015). Such an approach "has produced a spectrum of judicial responses, from great respect at one end ... to near indifference at the other." *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citations omitted).

The Board articulated its anti-class waiver policy position for the first time in *D.R. Horton*, where it expressed no qualms or reservations about categorically precluding enforcement of employment arbitration agreements containing class action waivers. It reasoned that prohibiting class waivers neither impermissibly conflicts with the FAA nor undermines "the pro-arbitration policy" on which it is based, 357 N.L.R.B. at 2285, because maintaining such waivers "interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." *Id.* at 2286.

In the Board's view, its broad interpretation of Section 7 rights under the NLRA does not conflict at all with what it characterized as the FAA's policy "permitting" enforcement of private arbitration agreements. *Id.* at 2285. Even assuming such a conflict did exist, the Board reasoned that its construction "represents an appropriate accommodation of the policies underlying the two statutes." *Id.* at 2284.

However, until *D.R. Horton* was decided, the Board had *never* construed Section 7 in that manner, and in fact only a few years earlier had published written guidance *confirming* that the mere existence of a class waiver would not implicate the Act. Specifically, in a June 2010 General Counsel memorandum, the Board provided that an employer does not violate the NLRA merely by requiring employees, as a condition of employment, to submit their employment disputes to arbitration on an individual, rather than class-wide, basis. Memorandum GC 10-06 from Ronald Meisburg, General Counsel, NLRB to All Regional Directors, Officers-in-Charge and Resident Officers (June 16,

2010).[3] In *D.R. Horton*, the Board switched course, concluding that the General Counsel's analysis just two years earlier was flawed and could not be reconciled with the Act's aims and purposes.

The Board elected to do so in a case decision, rather than through formal rulemaking, as expressly authorized by the NLRA. Notably, "Section 6 of the National Labor Relations Act empowers the Board to make ..., in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763 (1969) (quoting 29 U.S.C. § 156) (internal quotations omitted); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (describing difference between legislative and interpretive rulemaking under Administrative Procedures Act).

Despite its statutory authority to do so, the Board has never promulgated a legislative rule interpreting the meaning of "concerted activities." Instead, it has elected to establish enforcement policy on a case-by-case basis, which has facilitated the inconsistencies and dramatic shifts in interpretation that have marked the agency's arbitration guidance over the years. Indeed:

> [C]urrent problems with the NLRA are largely a result of the NLRB's approach to deciding unfair labor practice cases. The Board's approach is – some might say "notoriously" – marked by frequent shifts in precedent when the administration changes, combined with a policy of non-acquiescence with federal appellate court rulings

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[3] https://www.nlrb.gov/reports-guidance/general-counsel-memos (last visited June 15, 2017).

> until the Supreme Court ultimately decides an issue. In this regard, it is well-established that the NLRA empowers the Board to engage in both notice-and-comment rulemaking and adjudication of individual cases (subject to review by the federal courts of appeal). However, the Board has historically opted to set policy almost entirely through the latter means, generally refusing to propagate concrete rules guiding the interpretation of the NLRA. In the more than seventy-five years since its inception the Board has successfully engaged in legislative rulemaking on just a few occasions.

Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 Minn. L. Rev. 1879, 1884-85 (2014) (footnotes omitted).

The NLRA does not define the terms "concerted" or "protected" activity, or "mutual aid or protection." Rather, over the years, cases decided by the NLRB and the courts have reasoned that to be "concerted," the activity in question must include other employees or be authorized by other employees, and typically does not, but sometimes may, occur where an employee has acted solely on his or her own. For instance, concerted activity has been found where the employee's individual action is a "logical outgrowth" of previous group activity, *Every Woman's Place, Inc.*, 282 N.L.R.B. 413 (1986), *enforced*, 833 F.2d 1012 (6th Cir. 1987), or anticipates group participation in the future. *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

In *Timekeeping Systems, Inc.*, for example, the Board determined that concerted activity existed when an employee emailed his coworkers about a

proposed change in a company vacation policy in order to arouse support for his opposition to the proposal. 323 N.L.R.B. 244 (1997). Similarly, in *Citizens Investment Services Corp.*, a senior financial employee's email complaints to coworkers and management, as spokesperson for the other employees, was considered to be concerted activity. 342 N.L.R.B. 316 (2004), *enforced*, 430 F.3d 1195 (D.C. Cir. 2005).

Indeed, the Board's interpretation of "concerted activities" often seems to change from one factual scenario to the next. In the class waiver context, the Board insists that employees cannot exercise their Section 7 rights without access to class-based procedures. In other contexts, however, it has embraced a much more generous construction, judging many actions that epitomize pursuit of individual, as opposed to collective, interests nevertheless to fall within Section 7's protection. *See, e.g.*, *Whole Foods Market*, 363 NLRB No. 87 (2015), *enforced, Whole Foods Mkt. Grp., Inc. v. NLRB*, __ F. App'x __, 2017 WL 2374843 (2d Cir. June 1, 2017) (*per curiam*) (non-union employer's "no recording" policy chills employee Section 7 rights).

Over the last several years, for instance, the Board has been especially aggressive in expanding employee protections and curbing the right of employers to enforce workplace conduct policies. This includes a line of decisions prohibiting employers from disciplining employees who make offensive social media postings in the name of protecting their Section 7 rights.

The Board brought its first "social media" case against an employer in 2011, accusing the company of violating the Act by firing an employee who posted negative comments about her supervisor on her

personal Facebook page. *Three D LLC d/b/a Triple Play Sports Bar & Grille*, 2012 WL 76862 (N.L.R.B. 2012), *aff'd*, 361 N.L.R.B. No. 31 (2014), *enforced, Three D LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015). Since then, the Board has continued to pursue cases involving employees' use of social media. The Board cannot have it both ways by arguing that individual Facebook postings or workplace recordings may constitute concerted activity, but non-class arbitration somehow deprives employees of exercising those rights.

The Board's unpredictable and inconsistent views regarding what constitutes "concerted activity" under Section 7 further counsels against judicial deference, and the court below was wrong to have deferred to those views in this matter.

III. IMPOSING CLASS PROCEEDINGS EVEN WHERE THE UNDERLYING AGREEMENT DOES NOT PROVIDE FOR SUCH PROCEDURES FUNDAMENTALLY WOULD ALTER THE EXPECTATIONS OF BOTH EMPLOYERS AND EMPLOYEES BY IMPOSING THE VERY COSTS AND BURDENS SOUGHT TO BE AVOIDED BY FORGOING CLASS PROCEDURES

A. Forcing Access To Class Procedures Defeats Most, If Not All, Of The Business Advantages Of Arbitration

Taking the decision whether to allow class-based procedures out of the hands of the parties and instead permitting the Board to dictate the terms of such private agreements would be contrary to the strong

federal policy favoring arbitration and a disservice to the interests of employers and employees alike.

> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. *See* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995). The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citation omitted); *see also Concepcion*, 563 U.S. at 350.

For that reason and others, class action waivers have become an integral part of many employers' arbitration agreements. One reason that employers have adopted mandatory arbitration programs has been to reduce litigation costs. Allowing an arbitration to proceed as a class action after the parties have agreed to the contrary would undermine fundamentally the benefits of arbitration agreements by imposing on employers the very burdens they sought to avoid. Doing so would significantly discourage the use of arbitration, in contravention of the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25 (citation and footnote omitted).

Allowing an arbitration to proceed as a class action (whether in an arbitral or judicial forum) despite unambiguous contractual language barring such procedures also would profoundly undermine the efficiencies of arbitrating workplace disputes. Unlike the typical arbitration, employment class actions

involving hundreds or thousands of class members can be extremely complex and time-consuming to defend, especially where each class member is entitled to substantial individual damages, including compensatory and punitive damages. *See, e.g.*, 42 U.S.C. § 1981a.

Perhaps even more so than other types of claims, class-wide arbitration of employment disputes "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen*, 559 U.S. at 685. As this Court pointed out in *Stolt-Nielsen*:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure ... no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties ... thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. ... And the commercial stakes of class-action arbitration are comparable to those of class-action litigation.

Id. at 686 (citations omitted).

For employers, there are significant financial advantages to arbitration that are likely to disappear altogether if they are forced to submit to complex, class-based procedures, despite having expressly agreed to waive such procedures. For example, "when

damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Concepcion*, 563 U.S. at 350.

The Board in *D.R. Horton* downplayed the significance of the Court's observations in *Concepcion*, reasoning that the issues there were far more significant than in its case: whereas tens of thousands of potential claimants might be covered by the arbitration agreements California attempted to outlaw in *Concepcion*, in *D.R. Horton*, "only agreements between employers and their own employees are at stake." *D.R. Horton, Inc.*, 357 N.L.R.B. at 2287. According to the Board, "the average number of employees employed by a single employer ... is 20," *id.* (footnote omitted), and employment related class action litigation "involves only a specific subset of an employer's employees." *Id.* Therefore, in the Board's view, class-based employment arbitration is "far less cumbersome and more akin to an individual arbitration proceeding" in terms of cost, risk, speed and the like than the consumer claims at issue in *Concepcion*. *Id.*

The Board's characterization is completely off base and betrays a flimsy attempt, steeped in its newfound anti-arbitration bias, to create a special rule for employment arbitration agreements that does not apply to other contexts. Among other things, while most U.S. *businesses* may well employ less than 100 workers, a substantial proportion of the U.S. worker *population* overall likely is covered by an arbitration agreement.

Recent North American Industry Classification System (NAICS) data show that in 2015, 16,205 businesses employed at least 1,000 employees.[4] Many of those include companies whose arbitration programs have been challenged in court – including Ernst & Young, AT&T Mobility, and Bank of America, to name a few. In 2016, those three companies employed more than 450,000 workers in the U.S. alone.[5] The Board's suggestion that mandating class arbitration of employment claims would have little practical impact therefore is either naively off-the-mark, or intentionally misleading.

Arbitration by its very nature is designed to promote, rather than discourage, cost-effective resolution of individual claims in as non-adversarial a manner as possible. As Chief Justice Burger once observed:

> The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming, and, more to the point in this case, judges are less adapted to the nuances of the disputes that typically arise in shops and factories than shop stewards, business agents, managerial supervisors, and the traditional ad hoc panels of factfinders. By bringing together persons actually involved in the workplace, often assisted by a neutral arbitrator experienced in such matters, disputes are resolved more swiftly and cheaply. This mechanism promotes industrial harmony

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[4] *Firmographic Breakdown of Business Establishments by Company Size*, NAICS Ass'n, https://www.naics.com/counts-by-company-size/ (last visited June 15, 2017).

[5] STATISTA, The Statistics Portal, https://www.statista.com (last visited June 15, 2017).

> and avoids strikes and conflicts; it provides a swift, fair, and inexpensive remedy.

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 747 (1981) (Burger, C.J., dissenting) (citation omitted). Allowing an arbitration to proceed on a class-wide basis where the parties have agreed not to do so defeats most, if not all, of those aims.

B. Class Arbitration Deprives Employees Of Access To Speedy, Efficient Dispute Resolution

From an employee relations viewpoint, the informal nature of arbitration is a tremendous benefit to both employers and employees. Many employers view arbitration and other forms of alternative dispute resolution as an opportunity not only to resolve a specific dispute but also to preserve relationships with their employees, particularly those who will continue to work for them well after their claims are addressed. Besides the statutory mandate that arbitration agreements be enforced according to their terms, "for parties to employment contracts ... there are real benefits to the enforcement of arbitration provisions." *Circuit City Stores*, 532 U.S. at 122-23. As this Court observed over a decade ago:

> We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow the parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.

Id. at 123 (citation omitted).

Despite all the tangible benefits of employment arbitration, the *D.R. Horton* rule will only make it less likely that employers will retain employment arbitration programs, which in turn invariably will impose significant potential hardships on many workers whose ***only*** realistic access to justice is through arbitration. If employees with small individualized claims do not have access to simplified, low-cost arbitration and are forced into court, they could be priced out of the judicial system entirely. And it is not only employees with disputes who benefit from arbitration. The lower cost of dispute resolution reduces the costs of doing business, which manifests in lower prices for consumers and higher wages for employees. *See, e.g.*, Stephen Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91 (2001); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, *5-*7 (Jan. 1995).

CONCLUSION

Accordingly, the decision below should be reversed.

Respectfully submitted,

RAE T. VANN
Counsel of Record
NT LAKIS, LLP
1501 M Street, NW
Suite 400
Washington, DC 20005
rvann@ntlakis.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory
Council

June 2017

RECORD
AND
BRIEFS

Nos. 16-285, 16-300, 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,

v.

JACOB LEWIS, *Respondent*.

ERNST & YOUNG LLP, AND ERNST & YOUNG U.S., LLP, *Petitioners*,

v.

STEPHEN MORRIS AND KELLY MCDANIEL, *Respondents*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MURPHY OIL USA, INC., ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF FOR SUSAN FOWLER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 16-285 AND 16-300, AND PETITIONER IN NO. 16-307

CHRIS BAKER
BAKER CURTIS & SCHWARTZ, P.C.
Counsel of Record
44 Montgomery Street,
Suite 3520
San Francisco, CA 94104
cbaker@bakerlp.com
(415) 433-1064

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Susan Fowler is a former Uber employee. On February 19, 2017, she published a blog post entitled "*Reflecting On One Very, Very Strange Year At Uber*."[2] The blog post detailed her experiences at Uber, including her futile efforts to address workplace harassment, discrimination, and retaliation on the job.

As reported in the press, the blog post led to an investigation by former Attorney General Eric Holder. This investigation, in turn, resulted in more than 200 employee complaints, at least 20 terminations, and the eventual resignation of Uber's CEO, all arising from Uber's toxic culture.[3] But for Ms. Fowler's perhaps naïve courage in publishing her post – for which she faced an attempted smear campaign and a surreptitious investigation into her friends and family – Uber's workplace would have remained exactly the same.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amicus curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submissions of this brief. No person or entity, other than the amicus curie or their counsel, has made a monetary contribution to this brief's preparation or submission. *See* SUP. CT. R. 37.6.

[2] https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

[3] E.g., Mike Isaac, *Uber Fires 20 amid Investigation into Workplace Culture*, N.Y. TIMES, June 6, 2017, available at https://www.nytimes.com/2017/06/06/technology/uber-fired.html.

Uber required Ms. Fowler to sign a class action waiver[4] as a condition of employment. Uber makes all its workers sign these waivers. These waivers are now ubiquitous in the high tech industry and "gig economy," where the likelihood unionization is remote.

Class action waivers take from these workers the concerted activity in which they are most likely to engage, and from which they are most likely to benefit: The right to engage in collective litigation.

Fowler, as a former Uber employee subject to its class action waiver, has a significant interest in the outcome of these consolidated cases.

SUMMARY OF ARGUMENT

I. As the Uber example demonstrates, companies do not require arbitration agreements with class action waivers to resolve disputes "cheaply or quickly." Companies require class action waivers to limit or eliminate the legal risk associated with systemic – and potentially or certainly illegal – employment practices.

II. The right to litigate collectively is particularly important in the 21st century in that such litigation is the most readily available means for modern day workers to act in concert to improve their working conditions. Much of the modern workforce cannot reasonably engage in the "traditional" concerted activity of strikes or picketing.

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[4] The term "class action waiver" in this brief refers to the requirement that individual employees waive the right to participate in collective litigation, collective actions, collective arbitration, or similar conduct as a condition of employment.

III. Collective litigation – when meritorious – usually results in settlement negotiations (or bargaining), a "collective" settlement agreement, an improvement in working conditions, and a reduction of industrial strife. Without the right to collective litigation, there will be more systemic employment law violations, less effective ways to remedy them, and the balance between companies (i.e., capital) and talent (i.e., labor) will shift firmly in favor of capital.

This is contrary to Congress's intent in passing the NLRA.

ARGUMENT

I. THE PRIMARY PURPOSE OF CLASS ACTION WAIVERS IS TO LIMIT LIABILITY ARISING FROM SYSTEMIC ILLEGAL EMPLOYMENT PRACTICES

A. Employment Arbitration Is neither Cheap nor Efficient

Employment arbitration is really expensive. To ensure an enforceable arbitration agreement, employers typically agree to pay the entire cost of arbitration. See, e.g., *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (noting that large arbitration costs could preclude the vindication of statutory rights); AAA EMP. ARB. RULES & MEDIATION PROC., p. 31-33 (requiring employers who use the AAA to pay the cost of the arbitrator).[5] Arbitrator fees can

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[5] The AAA is the largest private provider of alternative dispute resolution services in the United States. AAA EMP. ARB. RULES & MEDIATION PROC., p. 7-8 (effective Nov. 1, 2009), available at

range from $300 an hour to $15,000 a day, plus administrative fees. Deborah Rotham, *Trends in Arbitrator Compensation*, DISPUTE RESOLUTION MAGAZINE, Spring 2017, at 8. As in court, an employee must pay his or her own attorneys' fees and costs. AAA Rules, R. 45.

In addition to being really expensive, employment arbitration is not particularly efficient. If an employer "slow-pays" the arbitrator (or does not pay at all), then the arbitration does not proceed. This allows the employer to dictate the pace of the proceedings. AAA Rules, R. 46, 47. Arbitration discovery by way of depositions, interrogatories, and document production is commonplace. Under the Federal Arbitration Act, the arbitrator may issue subpoenas (though a party must go to court to enforce them), 9 U.S.C. § 7, and an arbitrator must hear all "evidence pertinent and material to the controversy," or risk having the arbitration award vacated, 9 U.S.C. § 10(a)(3).

The legal fiction that employers require employment arbitration because it is "cheap and efficient" must be tempered with reality. Not all employers require arbitration, and if arbitration was such a superior dispute resolution method, they would. Rather, "[t]he employers that gain the most from arbitration (the discrimination prone or high-risk employers) will use mandatory arbitration. On the other hand, low-risk employers, because they do not want to pay the price implicit in mandatory arbitration (since it does not reflect their specific risk level), will

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https://www.adr.org/sites/default/files/Employment%20Rules.pdf ("hereinafter AAA Rules").

forego the risk-averting benefits of arbitration and take their chances on litigation. High-risk employers arbitrate; low-risk employers litigate." Scott Baker, *A Risk Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 864 (Fall 2004).

For employers, then, the primary benefit of employment arbitration is not that it is "cheap and efficient." The primary benefit is the employer's belief that the arbitration agreement is necessary to secure the class action waiver,[6] and the class action waiver – which prohibits today's workers' most effective means of concerted activity – is too good a deal for even a virtuous large employer to pass up.

B. The Uber Example

Uber Technologies, Inc. ("Uber") employs hundreds of thousands of workers in the United States: 6000 "W-2 employees" and more than 600,000 "1099 drivers" (who are either employees or independent contractors – a subject of much dispute). Amir Efrati, *How Uber Will Combat Rising Driver Churn*, THE INFORMATION April 20, 2017, available at https://www.theinformation.com/how-uber-will-combat-rising-driver-churn.

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[6] Note that the Fifth Circuit recently ruled that an employer can require employees to waive the right to proceed collectively in litigation even without an arbitration agreement. *Convergys Corp. v. NLRB*, No. 15-60860, ___ F.3d. ___, 2017 WL 3381432 (5th Cir. Aug. 7, 2017). One judge dissented from this opinion and a second judge concurred in judgment only. *Id.* at * 5. The concurring judge stated: "[i]f we were writing on a clean slate, I would urge that this court adopt Chief Judge Wood's and Chief Judge Thomas's reasoned understandings of Section 7's scope." *Id.*

Uber's standard contract for all these workers contains an arbitration agreement with a class action waiver. By intention, Uber is a "high-risk employer" as it relates to compliance with employment (and numerous other) laws.

In addition to the toxic workplace culture faced by Susan Fowler and others, Uber has been accused repeatedly of systematically violating a wide-swath of federal and state employment laws in federal court class actions. These allegations include stealing driver tips, failing to pay minimum wage and overtime, lying to employees about their equity compensation, electronically spying on drivers who work for a competitor, and the list goes on.[7]

Uber's typical response to this litigation is to say that workers cannot engage or participate in the concerted activity of collective litigation. For Uber, even 1000 very expensive individual arbitrations is exponentially cheaper than a single class action judgment.

Numerous other technology employers – even those without Uber's reputation or track record – have performed the same cost/benefit analysis with respect

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[7] Most recently, the Wall Street Journal published an article describing how Uber knowingly rented, to its Singapore workforce, defective cars that might catch on fire. Douglas MacMillan and Newly Purnell, *Smoke, Then Fire: Uber Knowingly Leased Unsafe Cars to Drivers*, WALL ST. J., August 3, 2017, available at https://www.wsj.com/articles/smoke-then-fire-uber-knowingly-leased-unsafe-cars-to-drivers-1501786430. From Uber's $70B valuation perspective, if one worker (or her family) sues after being burned alive, oh well. A class action, on the other hand. . . .

to class action waivers.[8] And, once a class action waiver is in place, it is that much easier for even the virtuous employer to be a little less virtuous. This in turns results in greater reliance on the waivers as "low-risk employers" who would normally forego arbitration, transform into "high-risk employers" who rely on it.

Accordingly, and today, if a person wants to work for a technology company – whether as an "employee" or as an "independent contractor" – he or she will likely be forced to waive their right to pursue collective litigation as a condition of their employment.

II. CLASS ACTION WAIVERS PROHIBIT THE PRIMARY MEANS OF CONCERTED ACTIVITY FOR 21ST CENTURY WORKERS

Congress has found that a single employee is "commonly helpless to exercise liberty of contract." 29 U.S.C. § 102. For this reason, "yellow dog contracts" – through which employers require individual employees to waive the right to engage in concerted activity – are illegal. 29 U.S.C. § 103.[9]

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[8] Among many others, both Google and Facebook require their workers to agree to arbitration with a class action waiver. *E.g.*, Google, Inc. and Nest Labs, Inc., A Single Employer, NLRB Case No. 32-CA-178708 available at https://www.nlrb.gov/case/32-CA-178708 (follow Signed Charge Against Employer, dated June 21, 2016 hyperlink).

[9] A union, by contrast, can waive the right to concerted activity on behalf of the employees it represents. This is because a labor organization, unlike individual workers, has economic power and will presumably only waive this right in exchange for something more valuable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983).

For much of the 20th century, workers engaged in concerted activity in aid of collective bargaining primarily in two ways: strikes and picket lines. Today, this type of concerted action is of limited value to millions of workers because of changes in technology and the rise of the "gig economy."

For example, 22% of all workers, and 43% of workers with advanced degrees, work remotely (at least on occasion). They are connected to their co-workers, managers, and customers by email, phone, computer networks, and video conferencing. American Time Use Survey News Release, USDL-17-0880 (Bureau of Labor Statistics June 27, 2017), available at https://www.bls.gov/news.release/atus.htm.

The percentage of telecommuters will increase over time because remote work decreases a company's operating costs and "working remotely" is fast becoming the norm for new entrants to the labor market. *See, e.g.* Jeanne Meister, *Flexible Workspaces: Employee Perk or Business Tool to Recruit Top Talent*, FORBES, April 1, 2013, available at https://www.forbes.com/sites/jeannemeister/2013/04/01/flexible-workspaces-another-workplace-perk-or-a-must-have-to-attract-top-talent/#2649a15c2ce7; 2015 After College Annual Survey, available at https://www.aftercollege.com/cf/2015-annual-survey. By 2020, "1 in 3 people will be hired to work online, from anywhere they want." Meister, *supra*. On top of this, employees now change jobs frequently. According to one study, the median tenure at a job for "workers between ages 25 and 35 was 1.42 years; the median tenure for those between the ages 35 and 55 was under two years; and for those between ages 55 and 65, it was 2.53 years." Dana

Wilkie, *Who's Job-Hopping Now?*, SOC'Y FOR HUM. RESOURCE MGMT., June 23, 2017, available at https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/job-hopping-.aspx.

The 21st century has also brought us the "gig economy," where workers are generally classified as "independent contractors" (though they may actually be statutory employees). Typically, these workers "get individual gigs using a website or mobile app that helps to match them with customers." Elka Torpey and Andrew Hogan, *Working in a Gig Economy*, Bureau of Labor Statistics, May 2016, available at https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

Turnover among "gig employers" is immense. Uber, for example, hires about 50,000 new drivers a month. Alyson Shontell, *Uber is the world's largest job creator, adding about 50,000 drivers per month, says board member*, BUS. INSIDER, May 15, 2015, available at http://www.businessinsider.com/uber-offering-50000-jobs-per-month-to-drivers-2015-3. Many of these drivers quit once they experience the company, but "[w]hen fed-up drivers quit, new drivers are willing to take their place – twice as many drivers every six months." Ellen Huet, *Uber's Ever-Renewing Workforce: One-Fourth of Its Current U.S. Drivers Joined Last Month*, FORBES, Jan. 22, 2015, available at https://www.forbes.com/sites/ellenhuet/2015/01/22/uber-study-workforce/#6170b3de367a.

In light of these changes in the modern workforce, the "economic weapons" of concerted action so prevalent in the 20th century – strikes and picket lines – are ineffective. Workers, for example, cannot engage

in a meaningful work stoppage when there is an endless supply of "strike replacements" in the form of 50,000 new drivers per month, or when employees change jobs every 18 months. Nor can workers rely on picketing to publicize their labor dispute and discourage others from "crossing the picket line." There is no place to put the pickets, because workers are geographically dispersed (in their homes or at a Starbucks), or connected to their jobs through nothing more than a mobile app.

By necessity, then, the modern workforce must turn to the third leg of "concerted activity" to aggregate their economic power and improve their working conditions: Collective litigation.

III. THE RIGHT TO PURSUE COLLECTIVE LITIGATION FURTHERS THE INTENT OF CONGRESS IN PASSING THE NLRA

Because of the economic leverage that comes with the aggregation of employment claims, most meritorious collective employment actions result in settlement negotiations and a settlement agreement. A 2009 study of California Class Action Litigation, for example, found that 46.8% of employment class actions resulted in settlement, 12.4% were dismissed with prejudice, and the remaining were either dismissed without prejudice, removed to federal court, or resulted in some other disposition. Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report*, ADMINISTRATIVE OFFICE OF THE COURTS (March 2009), available at http://www.courts.ca.gov/documents/class-action-lit-study.pdf.

Settlements arising from collective litigation are agreements that, if approved, bind those members who choose to participate in the action. These settlements often result in – not only payment to the employees – but also agreed-upon changes to the employees' working conditions. *E.g., Lane v. Brown*, 166 F.Supp.3d 1180 (D. Ore 2016) (approving class settlement on behalf of disabled employees reducing use of segregated workshops); *Wren v. RGIS Inventory Specialists*, No. C–06–5778, 2011 WL 1230836 (N.D. Cal. Apr. 1, 2011) (approving class action settlement that includes changes to corporate policies concerning donning equipment); *Hall v. Best Buy Co., Inc.*, 274 F.R.D. 154 (E.D. Pa. 2011) (approving class action settlement that required changes to time keeping procedures).

In other words, collective litigation is, in a very real sense, something done in aid of "collective bargaining." When done correctly, *collective* litigation results in a *collective* [settlement] agreement, reduces industrial strife (because the dispute is resolved as to those employees who participate) and improves the workers' lot in life. Employers cannot, consistent with the NLRA, take from employees the right to pursue this form of concerted activity as a condition of employment – even with the help of an arbitration agreement. To do so is contrary to Congress's intent in passing the Act.

CONCLUSION

For these reasons, Ms. Fowler asks that the Court rule in favor of the National Labor Relations Board and the Plaintiffs/Employees with respect to the consolidated petition.

Respectfully submitted.

Chris Baker
Counsel of Record
Baker Curtis & Schwartz, P.C.
44 Montgomery St., Suite 3520
San Francisco, CA 94104
cbaker@bakerlp.com
(415) 433-1064

Counsel for Amicus Curiae

August 16, 2017

RECORD AND BRIEFS

Nos. 16-285, 16-300, 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, et al.,
Petitioners,
v.
STEPHEN MORRIS, et al.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., et al.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF HR POLICY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF EMPLOYER PETITIONERS AND RESPONDENT

ALLYSON N. HO
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001

SAM S. SHAULSON
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
T. 212.309.6000
F. 212.309.6001
sam.shaulson@morganlewis.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964

QUESTION PRESENTED

Whether the National Labor Relations Act renders unenforceable a Federal Arbitration Act–governed agreement requiring an employer and an employee to resolve employment-related disputes in non-class arbitration.

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INTEREST OF *AMICUS CURIAE*[1]

HR Policy Association is the lead public policy organization of chief human resource officers representing the largest employers doing business in the United States and globally. HR Policy brings these executives together not simply to discuss how human resource practices and policies should be improved, but also to create a vision for successful HR strategies and pursue initiatives that promote job growth, employment security, and competitiveness. This creates a positive work environment for employees throughout the Association's members. Senior corporate officers also participate in the Association to leverage the combined power of the membership as a positive influence to improve public policy, increase returns on human capital, and advance the human resource profession.

Among the strategies for bettering the work environment is the use of agreements between employers and employees to arbitrate employment-related disputes. The use of arbitration to resolve an individual's claims—rather than class or collective proceedings—plays a critical role in producing desirable outcomes for dispute resolution in the workplace. Importantly, it allows both sides to address these disputes in a manner

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[1] Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office.

minimizing both the costs and delays associated with traditional litigation, including collective and class action proceedings—with employers often paying virtually all of the costs involved—and is ultimately more conducive to maintaining an ongoing and healthy relationship between the parties. The procedure also affords employees greater privacy than could be maintained in public court proceedings—an important consideration when so many employment claims involve a medical condition or disability of an employee or family member, or the employee's work performance and disciplinary history. Such privacy concerns are also important considerations for business entities as company trade secrets, customer data, and other proprietary and confidential information may be involved in a dispute. Furthermore, arbitration generates higher-value claims for individuals and provides an avenue for quicker resolution of those claims.

HR Policy has consistently advocated on behalf of its members regarding issues related to the National Labor Relations Act. By representing corporations with matters pending before the National Labor Relations Board, the Association works to ensure that Board determinations are sound, practical, and responsive to the realities of today's workplace. HR Policy thus has a significant interest in ensuring that the standards set forth by the Board are consistent with both the language and purposes of the Act. This includes the ability of corporations to use employment agreements that require employers and employees to

resolve employment-related disputes through non-class arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arbitration agreements allow all parties to minimize the costs and delay of litigation. *14 Penn Plaza* v. *Pyett*, 556 U.S. 247, 257 (2009). They are especially useful in the employment context, where allowing companies and employees to agree to arbitrate an individual employee's claims avoids class mechanisms that "make the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). This helps explain why the Federal Arbitration Act, designed to promote arbitration in the face of the historical judicial hostility to it, "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006).

The attempt here to circumvent previously agreed-upon arbitration provisions threatens this efficient system. Importantly, the current arbitration-favoring regime not only reduces litigation costs, it also provides better access to justice for all parties. Arbitration doubtless helps employers by protecting them from class exposure where the *in terrorem* effect can lead to unjust settlements of meritless claims. But it also helps employees in several areas.

First and foremost, the tendency of class or collective actions to settle claims on a generalized or formula basis—a result favored by plaintiffs' attorneys bringing the actions—can harm each individual employee by devaluing individual claims. Moreover, individual treatment of claims is much better for employees with stronger cases than the putative class representative(s). Additionally, not only are resolution costs cheaper for employees—with employers often paying virtually all of those costs—arbitration provides the individual employee with a result (and thus a remedy) in a matter of months rather than years. See, e.g., Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998) (reporting that the average employment discrimination case takes almost two full years to complete in litigation but only 8.6 months to resolve through arbitration); Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, Arbitration Committee of the ABA Section of Dispute Resolution, at 1-2 (noting that pursuing a case through appeal can take almost three-and-a-half years, on average).[2] And this does not even account for the additional time needed to resolve collective or class-action litigation as opposed to individual litigation.

Furthermore, employees gain advantages through the processes involved with arbitration. Individual arbitration provides increased confidentiality, allowing

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[2] Available at http://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

employees to raise claims involving things such as medical conditions and disciplinary issues without making that information a matter of public record. Arbitration also provides a system in which employers generally have a diminished ability to use dispositive motions prior to an evidentiary hearing and where procedural defenses, such as limitations and jurisdiction, tend to be less likely to be accepted. And because collective and class action claims often involve extensive notice procedures, discovery proceedings, and motion practice—which arbitrators often do not have the requisite staff and resources to resolve—resolution in court works against employees who would be better served by individual arbitration. Although the putative class representatives here—or their counsel—may choose to jettison these benefits and protections in favor of their own interests in aggregating claims, there is no legal basis for doing so—particularly given the strong federal policy in favor of arbitration.

The Board's position involves at least three incorrect assumptions that require its rejection. First, bringing a class action cannot be "concerted activity" under the Act because, by definition, that procedural device is used to aggregate the claims of people who may be unknown to the named plaintiff(s). The mere act of bringing a class action does not involve working in concert with those who have not provided their consent or authority. Plaintiffs are not required to be authorized to represent other employees and seldom, if ever, have personal knowledge of what employees may

end up being part of the "class." Thus there is no concerted activity outside of the named plaintiffs themselves. Indeed, *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), & *Meyers Industries*, 281 NLRB 882, 885-86 (1986) (*Meyers II*), stand for the proposition that there cannot be virtual representation under the NLRA. In other words, the existence of a class action that may affect others does not create the requisite concertedness between the putative representative and other parties they seek to represent. The proper inquiry should consider actual interactions between employees, not the perceived interests they may share. *Meyers II*, 281 NLRB at 886, 888.

Because Rule 23 and collective actions are designed to let named plaintiffs act as self-designated surrogates for the entire class—a permission unavailable under *Meyers*—the procedural device cannot satisfy the requirement that employees must be acting in concert. Further proof that plaintiffs are not acting in concert with absent, unknown class members can be seen in the fact that class representatives can settle unilaterally their individual claims before certification. Plaintiffs—along with the Seventh and Ninth Circuits—assumed that class actions would qualify as concerted activity. That misreads this Court's cases. To the extent that "concerted activity" in the statute provides for group litigation, it still requires the action to be taken in concert—an element persistently absent here.

Second, employees are *exercising* their NLRA rights when they agree to arbitrate disputes on an individual basis—not waiving them. Section 7 confers the right of an individual not only to join in concerted activities but also to *refrain* from them. Likewise, Section 9 allows the employee to adjust claims on an individual basis at any time. The Board's own opinion, *D.R. Horton*, underscores this point as it concedes that unions may prospectively waive employees' rights to bring a group action in court. *D.R. Horton, Inc.*, 357 NLRB 2277, 2286 (2012). If the employee may delegate that right to the union, the employee must certainly possess the right in the first instance. Cf. *14 Penn Plaza*, 556 U.S. at 258 ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.").

Third, the FAA's savings clause, by its express terms, applies only to generally applicable contract defenses like fraud or duress, not to a defense unique to employee class waivers. It is this Court's contrary congressional command jurisprudence—not the Seventh or Ninth Circuits' incorrect interpretation of the savings clause—that provides the rule of decision whenever there is an arguable conflict between the FAA and another federal statute. See, e.g., *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 103-04 (2012). Indeed, if the Seventh and Ninth Circuits' analysis of the savings clause were correct, then *Concepcion* would have come out differently.

For these reasons, the judgments of the Seventh and Ninth Circuits should be reversed, and the judgment of the Fifth Circuit affirmed.

ARGUMENT

I. Filing A Class Action Is Not Concerted Activity Shielded By Section 7.

Section 7 of the NLRA allows employees to engage in "*concerted* activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (emphasis added). Contrary to the Seventh and Ninth Circuit opinions, *Epic* Pet.App.5a-6a & *Ernst* Pet.App.17a, class actions do not fall within this category of protected activities. That is because filing a class action involves taking action without the knowledge and consent of others—bare necessities for activity to be done in concert. Two or more employees can act together to file a lawsuit, but it is a different matter entirely when employees purport to file a class action on behalf of unidentified others. There is no "meeting of the minds"—as normally evidences agreement in the law—on which to base the activity. Moreover, the mere fact that class litigation may affect others does not mean that concertedness may be presumed. See *Meyers II*, 281 NLRB at 888 (rejecting "constructive concerted activity" theory). Thus filing a class action—properly measured at the moment a

suit is filed—cannot be "concerted activity" under the Act.

The NLRA itself does not define "concerted activities." See *Bekele* v. *Lyft, Inc.*, 199 F. Supp. 3d 284, 308-09 (D. Mass. 2016). Whether an action is "concerted" depends on the precise manner in which the actions of one employee are linked to the actions of fellow employees, rather than to the perceived interests of the other employees. See *Meyers II*, 281 NLRB at 886 (holding that the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the evidence). As noted by Judge Ikuta's dissent in *Ernst & Young*, the meaning of "concerted" when the NLRA was enacted is "mutually contrived or planned: agreed on." *Ernst* Pet.App.35a-36a (quoting WEBSTER'S INT'L DICTIONARY OF THE ENGLISH LANGUAGE 295 (1903 ed.)). The case law interprets "concerted" under Section 7 in the same common-sense way: the activity must be engaged in with or on the authority of other purportedly involved employees. See *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *NLRB* v. *Portland Airport Limousine Co.*, 163 F.3d 662, 664-65 (1st Cir. 1998). An employee thus engages in "concerted activity" when he acts jointly with or is expressly authorized to act on behalf of one or more other employees.

A Rule 23 class is a rule-created, judicially imposed relationship that positions the named class representatives and class counsel as surrogates of the entire class—without any agreement, joint action, or

necessarily any knowledge whatsoever. A class representative's status as a representative is "voluntary and non-contractual." RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) cmt. f (1972). Rule 23 does not require that the representation be explicitly or even implicitly consensual.

Plaintiffs here are acting on behalf of themselves and, solely through procedural devices like Rule 23, purporting to act on behalf of putative class members. Yet plaintiffs have not been expressly authorized to represent those other employees, nor have those other employees joined with plaintiffs in group action. The fact that the *Epic* and *Ernst & Young* complaints were initially filed by only one plaintiff each, *Epic* Pet.App.24a, *Ernst* Pet.App.43a, necessarily means that they are not actually joined by any other employees beyond the named ones at the time suit was filed. Neither have plaintiffs been authorized to pursue the claims of others but, instead, seek to invalidate their class-action waivers by unilaterally designating themselves to act for a class of absent individuals who have not consented to joining the instant action. This action is not concerted. It is neither mutually contrived nor planned—there is no agreement whatsoever outside the named plaintiffs.[3]

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[3] However one might view the argument that two or more plaintiffs agreeing to file a lawsuit, and taking action together to do so, is "concerted activity" under the Act, attempting to act on behalf of an absent class—unknown, unconsenting, and ignorant of the lawsuit—is a conceptual world apart.

This fundamental problem cannot be solved by the allegedly common interests of the putative class members. The plaintiffs have already begun to act for their benefit, but without knowing all other class members. To conclude otherwise would resurrect the theory of "constructive concerted activity," a theory rejected by the Board and Circuit Courts. See *Meyers I*, 268 NLRB at 497; reaffirmed, *Meyers II*, aff'd, 835 F.2d 1481 (D.C. Cir. 1987); see also *Prill* v. *NLRB*, 835 F.2d 1481, 1483 (D.C. Cir. 1987) (affirming NLRB decision holding that "if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement").

The lack of necessary "concerted activity" in such cases is also demonstrated by the fact that a named class representative can settle his individual claim before class certification. See *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 672 (2016). If the class action were truly a "concerted" action, it could not be extinguished by the voluntary plaintiff's unilateral decision to dismiss it. Similarly, if a class action were necessarily a concerted action, settlement or a judgment in the action should bind all class members prior to certification—but a settlement or judgment prior to certification has no binding effect on absent class members. See *Standard Fire Ins. Co.* v. *Knowles*, 133 S. Ct. 1345, 1349 (2013).

To invalidate a class-action waiver on these facts would mean that an employee can deliberately evade an arbitration agreement containing a class-action

waiver merely by paying a nominal filing fee and filing a complaint that satisfies the notice pleading requirements of Rule 8. Such an act can hardly be "concerted" when no one other than the named plaintiff(s) knows that they are "engaged" in the act. There is no reason that plaintiffs here should be relieved of their contractual agreement to resolve their claims on a non-class basis through the simple expedient of purporting to bring claims on behalf of others who have not authorized them to act.[4]

To be sure, this Court has included "resort to administrative and judicial forums" together with others, in the pantheon of *potential* concerted activity protected by the NLRA. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-66 (1978). Likewise, as the Seventh Circuit noted (at *Epic* Pet.App.5a), this Court has recognized that an employee acting alone may still qualify as "concerted activity" when intending to induce group activity or acting as a representative of at least one other employee. *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984). The error made by the Board and Seventh Circuit there was to assume this meant that class

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[4] The result is no different in Fair Labor Standards Act "opt-in" collective action cases. The named plaintiff(s) has already gone to the court, without the knowledge and permission of any other potential litigant, and engaged the court's processes to begin the action against the employer. The plaintiff(s) wants the court to provide notice—as Judge Posner memorably put it, the plaintiff wants to ask "the judge * * * to [act as] town crier, ringing the tocsin to awaken those who may be sleeping on their rights," *Woods* v. *N.Y. Life Ins. Co.*, 686 F.2d 578, 582 (7th Cir. 1982)—in order to aggregate potential claims with unknown others who do not know of and have not authorized the action.

action filings are necessarily "concerted activity," and to ignore the limited circumstances under which this Court has allowed one employee to engage in "concerted activity." That error conflates this Court's holding that litigation *can* constitute protected activity in some limited instances with the question of whether litigation actually *is* protected (because it is concerted) in any particular instance.

The Seventh Circuit, for example, overread *City Disposal* to justify treating a single plaintiff's class action as concerted activity. That is because *City Disposal* specifically dealt with the "invocation of a right derived from a collective-bargaining agreement." *Id.* at 830. The plaintiff there (ostensibly) acted on behalf of other union members when he refused to drive a truck that violated provisions in the collective bargaining agreement for vehicle safety. *Id.* at 826-28. The employee was taking action by himself, but it was to enforce agreed-upon substantive rights in the collective bargaining agreement and would inure to the benefit of all employees no matter what else the employee did—as the dissent described the majority's position, "the reasonable, good faith assertion of a right contained in the collective bargaining agreement is said to be an extension of the concerted action that produced the agreement." *Id.* at 842 (O'Connor, J., dissenting). Because the right came from concerted activity in the first instance, this Court held that "[a] lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense." *Id.* at 832 (majority opinion).

That is different from the present cases where class- or collective-action procedural devices have not been guaranteed through concerted activity, such as a collective bargaining agreement. If such mechanisms had been negotiated in collective bargaining, the actions of an individual plaintiff here seeking class certification might well qualify as "concerted activity" under *City Disposal*. As it is, the guarantees of *City Disposal* and *Eastex* do not apply to class actions and the filing of class-action complaints here cannot qualify as "concerted activity."

Some Board members, of course, believe that wage and hour class actions are an acceptable form of concerted activity. But the artificial relationship imposed by engaging the court's processes—through class or collective action—cannot constitute "concerted activity" since it would be the court, not the employee(s), taking the action that generates concert. Consider that even the Board itself has acknowledged that "there is no right to use an employer's bulletin board" in order to engage in union activity. *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (quoting *Honeywell, Inc.*, 262 NLRB 1402 (1982), enforced, 722 F.2d 405 (8th Cir. 1983)). In other words, when an employee engages in concerted activity, she cannot force the employer or another third party to take an action for her (such as posting flyers on a bulletin board or making copies of handbills for her to distribute). This common sense example shows that an employee attempting to commandeer another party for its purposes does not

constitute concerted activity of the type protected by the Act.

As the dissent in *Murphy Oil* explained—see *Murphy Oil* Pet.App.70a-72a (Member Miscimarra, dissenting)—*amicus* is not arguing here that employees engaging in collective litigation can never be concerted activity. Only that employees do not have a statutory right to use the machinery of the courts—such as Rule 23 or a court's collective action notice procedures—to create concertedness. That is necessarily a separate step (as any procedural device would be) that is not covered by the Act.

Assuming that some actual concerted activity between two or more identifiable individuals might take place in the future if a court uses class or collective notice procedures also does not bring the filing of a class or collective action within the scope of the Act. Indeed, there is no guarantee that any concerted activity will take place in the future. Class and collective actions are brought "on behalf of" members of the class and those alleged to be similarly situated. FED. R. CIV. P. 23(a); 29 U.S.C. § 216(b). There is no requirement that the named plaintiff(s) or their counsel communicate with members of the class or work together with them. In fact, class certification or class identification proceedings may result in class representatives and their counsel taking positions that are contrary to the interests of other employees—the complete opposite of concerted protected activity.

Further, even if one incorrectly assumed that class litigation eventually results in some type of concerted activity, one still needs to consider the practical realities of class- and collective-action litigation. The costs and distractions begin from the moment a class or collective action is filed—companies are forced to spend considerable sums and divert significant human capital in mere preparation for litigation and throughout class certification proceedings. In many cases, the mere filing of class litigation or the expense involved in class discovery will force a settlement and such "settlement" may be adverse to, or not fully address, the interests of other employees—again, contrary to the concept of protected concerted activity. This further illustrates why the "concerted activity" must be measured from the moment a suit is filed rather than some future time when the court's procedures could possibly manufacture some actual concerted activity.

In sum, the simple act of filing a class- or collective-action lawsuit—in an attempt to use judicial processes to troll for possible co-plaintiffs—cannot qualify as concerted activity under the Act. Thus the arbitration clauses at issue here should be enforced.

II. Arbitration Agreements Are An Exercise Of NLRA Rights, Not A Waiver Of Them.

Independent from the lack of concerted activity in the class actions filed here, plaintiffs are unable to evade their arbitration agreements because those agreements represent an *exercise* of their NLRA right

to decline participation in class litigation—not a waiver of any right protected by the NLRA.

Section 7 of the NLRA confers on employees the right to agree on procedures for resolving their individual disputes. Section 7, as originally enacted in 1935, addressed only the rights of workers "to organize, to bargain collectively, and to engage in concerted activity for their mutual aid and protection." *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60, 66 (2008). "Concerned that the [1935 version] had pushed the labor relations balance too far in favor of unions, Congress passed the [Taft-Hartley Act] amend[ing] §§ 7 and 8 in several key respects." *Id.* at 67. Among other things, the Taft-Hartley Act explicitly granted employees the statutory right to refrain from activities protected under Section 7. *Ibid.* Section 7 now states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (emphasis added).

The NLRA does not mandate that employees resolve their disputes through group litigation, nor does it forbid employees from exercising their Section 7 right contractually to refrain from participating in group litigation. Instead, Section 7 unequivocally grants employees the right not to participate in concerted activity. When an employee agrees to an arbitration agreement with a class-action waiver, that employee has exercised his Section 7 right to decline participation in concerted litigation.[5]

The NLRB's decision in *D.R. Horton, Inc.*, reinforces the point. There, the majority held that employees may delegate to their unions the right to agree, in advance, to have their members' future disputes decided in individual arbitration. See *D.R. Horton*, 357 NLRB at 2286 (citing *Pyett*, 556 U.S. at 258 (holding that a union, in a collective bargaining agreement, may prospectively agree to individual arbitration and waive employees' rights to bring an action in court)). If this

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[5] As this Court has noted in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), agreement as a condition of employment is acceptable in this context. The arbitration agreements do not qualify as a modern-day equivalent of "yellow-dog contracts" since they do not seek to curtail the employee's right to unionize or bargain collectively. See, e.g., *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 360 (1940) (invalidating agreements where employees agreed not to "demand a closed shop or a signed agreement by his employer with any Union"). Those holdings deal with core NLRA activities (unionization, collective bargaining, etc.) and not the process for litigating claims arising under other statutes such as the FLSA or Title VII. As such, the arbitration agreements are not "a continuing means of thwarting the policy of the Act." *Id.* at 361.

were a nonwaivable statutory right, then an employee would not be able to waive that right prospectively through his union.

Moreover, an employee who can delegate such a right to a union certainly may choose to exercise that right himself. "Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Pyett*, 556 U.S. at 258. Indeed, a fundamental principle of agency law is that a principal may not delegate to his agent authority which he himself does not possess. See RESTATEMENT (SECOND) OF AGENCY § 17 (1958). The Seventh and Ninth Circuits' decisions fail to consider employees' statutory right to refrain from collective activity, and, in fact, strip individual employees of this right. Plaintiffs here, exercising their Section 7 and 9 rights, agreed to proceed on a non-class basis with respect to their employment disputes. That agreement is entitled to enforcement.

Section 9(a) of the Act likewise protects the right of every employee as an "individual" to present and adjust grievances, "*at any time*," "without the intervention of the bargaining representative." 29 U.S.C. § 159(a) (emphasis added). This "individual" right to "adjust" a dispute "at any time" necessarily encompasses an employee's right to agree with his employer on the procedures by which those individual disputes will be resolved. Not only does Section 9(a) safeguard the individual employee's right to enter into arbitration agreements with his employer to "adjust" claims

on an "individual" basis, but the Act also expressly protects his right to do so "at any time."

These same points have been made by now–Acting Chairman Miscimarra in multiple Board cases. See, e.g., *Murphy Oil* Pet.App.115a-124a (Member Miscimarra, dissenting in part). He argues that "Section 9(a) protects the right of every employee as an 'individual' to 'present' and 'adjust' grievances 'at any time'" and that Section 7 "protects each employee's right to 'refrain from' exercising the collective rights enumerated in Section 7." *24-Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 3-4 (2015) (Member Miscimarra, dissenting).

Because the exercise of NLRA rights cannot be a waiver of them, the arbitration agreements at issue here are enforceable.

III. The FAA's Savings Clause Does Not Allow Courts To Make An End-Run Of The Analysis Required By This Court's Cases.

As the parties have argued, the FAA's savings clause cannot be used to justify ignoring the FAA's own strong policy in favor of arbitration. The savings clause provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon

> such grounds as exist at law or in equity *for the revocation of any contract*.

9 U.S.C. § 2 (emphasis added). Plaintiffs—as well as the Seventh and Ninth Circuits—have argued that the "savings clause" somehow allows courts to bypass the FAA because class-action waivers are grounds for revocation of the arbitration agreement. But by its express terms, the savings clause applies only to generally applicable contract defenses like fraud or duress, not to a defense unique to employee class waivers. *Concepcion*, 563 U.S. at 339 ("This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses * * * ' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

It is *Concepcion* and the Court's contrary congressional command jurisprudence (as seen in *CompuCredit*)—not the Seventh and Ninth Circuits' interpretations of the FAA's savings clause—that provide the roadmap for addressing any conflicts between the FAA and other statutes. In *Concepcion*, this Court articulated one critical aspect of the analysis for resolving any conflicts between the FAA and other laws. In that case, the California state-law policy disfavoring arbitration agreements was forced to yield to the purposes and objectives of Congress embodied in the FAA. *Id.* at 352. Importantly, this Court so ruled because the defense at issue only existed because of the presence of an arbitration provision with a class-action

waiver. Because it was not a generally applicable contract defense that provided "for the revocation of any contract," the savings clause was not triggered. 9 U.S.C. § 2. The same thing is true here.

But under the Seventh and Ninth Circuits' current approach, the specific presence of an arbitration provision with a class waiver is all that is needed to activate the savings clause. This is in direct opposition to *Concepcion*'s teaching. See *Kindred Nursing Ctrs. LP* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (holding that the savings clause "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (quoting *Concepcion*, 563 U.S. at 339)). Like the state law in *Kindred Nursing*, using the Act in the way the Board argues would "covertly accomplish[] the same objective" as a law that outright prohibited arbitration. *Ibid.* But since the presence of an arbitration clause is not a traditional contract defense such as fraud, it cannot be used to invoke the savings clause here.

Any notion that this analysis is applicable only to state laws—as in *Concepcion* or *Kindred Nursing*—is disproved by *CompuCredit*, which provides the analytical framework for evaluating federal laws arguably in conflict with the FAA, and treated a federal statute (the Credit Repair Organizations Act) the same way. *CompuCredit*, 565 U.S. at 103-04. There, the statutory

language indicated that customers had the "right to sue" and that waivers of consumer protections were invalid. *Id.* at 99. This Court held, however, that such language was not a sufficiently clear congressional command to prevent arbitration. *Id.* at 103-04.

This follows the familiar analysis set forth in *Gilmer*. There, this Court rejected the claim that judicial enforcement of the Age Discrimination in Employment Act was a nonwaivable right because, even though the Act allowed for a judicial forum and expressly authorized—like the FLSA—bringing collection action claims, it "did not explicitly preclude arbitration" (which necessarily means that class actions were excluded). 500 U.S. at 29-32. Because Congress has not demonstrated with "clarity" the intent to override the FAA in this context, its mandate to enforce arbitration agreements remains in place. See *CompuCredit*, 565 U.S. at 99-103.

Because of the federal policy favoring arbitration, "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339. But if the Seventh and Ninth Circuits were correct, arbitration agreements will always naturally play second fiddle to contrary laws under the savings clause analysis. Indeed, *Concepcion* itself would have come out differently—the FAA's savings-clause exception would have allowed the contrary law to trump the arbitration agreement. The same is true of *CompuCredit*. Taking away that rule would mean that the FAA would always give way to other statutes. See

Ernst Pet.App.39a-40a (Ikuta, J., dissenting). That cannot be right.

Finally, using the savings clause to do an end-run around this Court's analysis in *Concepcion* and *CompuCredit* is completely misplaced given that the resolution of non-NLRA claims does not affect core Section 7 rights. The Board has "power to adjudicate the validity or effect of [individual employment] contracts * * * as to their effect on matters within its jurisdiction," but such power is applicable primarily to contracts "utilized to forestall collective bargaining and deter self-organization." *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 340 (1944). That is because these are the Act's core concerns.[6]

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[6] Not even all concerted activity is protected by the Act, depending on the manner in which it is exercised. See *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). For example, an employer cannot prevent an employee from discussing unionization at the water cooler during break time, but could prevent an employee from discussing unionization while talking to customers. See *id.* at 803 n.10. While restricting an employee's ability to bring collective litigation entirely may be different than a "time and place" restriction on organizing activity, the underlying principle is the same: certain restrictions may interfere with an employee's attempt to engage in "concerted activity" without making it an unfair labor practice (let alone provide a generally applicable contract defense capable of triggering the savings clause). See *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (noting that the Board must undertake the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner" before finding a Section 8 violation).

The Board overlooked this point in *D.R. Horton* by failing to recognize that Section 7 rights fall on a spectrum and, at some point, must be balanced against other statutory and common law rights. See *Hudgens* v. *NLRB*, 424 U.S. 507, 521-23 (1976) (stating that whether Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted"). Whether an FLSA, Title VII, or other employment law claim is litigated on a class or collective basis, or whether it is subject to individual arbitration, is further away from the NLRA's core concerns—organizing and collective bargaining—and thus should be balanced against the concerns of the FAA. *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

While Congress could override the FAA explicitly, if the contrary analysis offered by the Seventh and Ninth Circuits were correct, even a federal statute that inadvertently made arbitration agreements unlawful—or, of course, any state statute that did so explicitly—would prevail over the FAA by virtue of the savings clause. The exception would thus swallow the rule. This is wrong under the plain language of the savings clause; it is wrong under Congressional policy embodied in the language of the FAA; it is wrong under this Court's precedents; and it is inconsistent with the

rights conferred by the NLRA. Such an interpretation—creating conflict with multiple statutes and precedents—cannot be correct and must be overruled.

CONCLUSION

The judgments of the Seventh and Ninth Circuits should be reversed, and the judgment of the Fifth Circuit affirmed.

Respectfully submitted,

SAM S. SHAULSON
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
T. 212.309.6000
F. 212.309.6001
sam.shaulson@morganlewis.com

ALLYSON N. HO
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
T. 214.466.4000
F. 214.466.4001

Counsel for Amicus Curiae

RECORD AND BRIEFS

Nos. 16-285; 16-300; 16-307

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND
ERNST & YOUNG U.S., LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh, Ninth And Fifth Circuits

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENTS IN NO. 16-307

MARY-CHRISTINE SUNGAILA*
HAYNES AND BOONE, LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC.Sungaila
@haynesboone.com

ALEX R. STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
(214) 651-5475
Alex.Stevens
@haynesboone.com

Attorneys for Amicus Curiae
International Association of Defense Counsel
**Counsel of Record*

June 16, 2017

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INTEREST OF *AMICUS CURIAE**

The International Association of Defense Counsel (IADC), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of the IADC in the benefits of arbitration is exemplified by its participation as *amicus* before this Court in several cases concerning federal arbitration law, including, inter alia, *Am. Express*

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* No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of *amicus* briefs or have separately consented to the filing of this brief.

Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

SUMMARY OF THE ARGUMENT

In two of the three decisions below, the Seventh and Ninth Circuits became the first federal circuit courts of appeals to hold that employer-employee agreements to arbitrate employment disputes on an individual basis are impermissible restrictions on employees' rights to act in concert under the National Labor Relations Act (NLRA) and therefore unenforceable under the Federal Arbitration Act (FAA). Unlike the Fifth Circuit, which correctly concluded that the NLRA does not bar such agreements in the third decision below, the Seventh and Ninth Circuits reached the opposite conclusion by analyzing whether such agreements could be deemed unlawful under the NLRA, then looking to whether the FAA changed this result, and concluding that because such agreements could be deemed unlawful under the NLRA, they were unenforceable under the FAA's savings clause.

In this *amicus* brief, we provide additional reasons why this Court should reject the Seventh and Ninth Circuits' approach, and affirm its prior holdings that under the FAA, arbitration agreements must be enforced according to their terms unless this enforcement mandate is overridden by a contrary congressional command. We then explain that unless this Court rejects the Seventh and Ninth Circuits' attempts

to undermine the FAA and this Court's prior precedents, the unpredictability engendered by the decisions below will likely reverberate beyond the employment context, casting agreements to arbitrate other claims into doubt and further vitiating the liberal federal policy in favor of arbitration that undergirds the FAA.

ARGUMENT

I. The Seventh and Ninth Circuits Incorrectly Failed to Apply This Court's Contrary Congressional Command Test In Assessing Whether the NLRA Overcomes the Liberal Federal Policy in Favor of Arbitration Expressed in the FAA.

Congress passed the FAA in an attempt to "'reverse[e] centuries of judicial hostility to arbitration agreements,' by 'plac[ing] arbitration agreements upon the same footing as other contracts.'" *Shearson/Am. Express v. McMahon*, 107 S. Ct. 2332, 2337 (1987) (citing *Scherk v. Alberto-Culver Co.*, 94 S. Ct. 2449, 2453 (1974)). Section 2 of the FAA accomplishes this goal by declaring that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This and other provisions of the FAA thus reflect "a 'liberal federal policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye*

Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). This Court has repeatedly applied this policy to hold that courts must enforce arbitration agreements according to their terms, *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Concepcion*, 563 U.S. at 339, including terms requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g., Italian Colors Rest.*, 133 at 2308-10; *Concepcion*, 563 U.S. at 352.

In contravention of this Court's precedent, however, the National Labor Relations Board (NLRB) determined in 2012 that agreements requiring individual arbitration of employment disputes unlawfully interfere with employees' rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under NLRA Section 7. *D.R. Horton, Inc.*, 357 NLRB 2277, 2278 (2012); *see also* 29 U.S.C. § 157. The NLRB further concluded that such agreements violate NLRA Section 8(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [Section 7]." *Id.* at 2280; *see also* 29 U.S.C. § 158(a)(1). The NLRB accordingly ordered the employer-respondent to cease and desist from invoking a mandatory arbitration agreement with class and collective action waivers, and to rescind or revise its existing arbitration agreement to clarify that it did not constitute a waiver of the right to maintain employment-related class or collective actions. *Id.* at 2289.

The employer-respondent in *D.R. Horton* filed a petition for review in the Fifth Circuit, and the NLRB filed a cross-application for enforcement. The Fifth Circuit ultimately refused to enforce the portion of the NLRB's order invalidating the employer's arbitration agreement on the basis of its class and collective action waivers, finding the NLRB's hostility to such waivers in employee arbitration agreements to be incompatible with the FAA. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013). Despite this ruling, the NLRB continued to seek to invalidate class and collective action waivers in employee arbitration decisions, including in one of the three cases now before this Court, *see Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), Case No. 16-307.

Unconvinced by the NLRB's reasoning, the Second, Sixth, and Eighth Circuits and the Supreme Courts of California and Nevada have all joined the Fifth Circuit in rejecting the argument that the NLRA renders unenforceable agreements to resolve employment disputes in individual arbitration. *See NLRB v. Alt. Entm't, Inc.*, No. 16-1385, 2017 U.S. App. LEXIS 9272 (6th Cir. May 26, 2017); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052, 1054-1055 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 149-150 (Cal. 2014); *Tallman v. Eighth Judicial Dist. Court*, 359 P.3d 113, 122-123 (Nev. 2015). The Seventh and Ninth Circuits, on the other hand, in the other two

cases before this Court, have reached the opposite conclusion, siding with the NLRB in determining that arbitration agreements with class or collective action waivers were unenforceable under the NLRA. Both decisions relied on the FAA's savings clause, which creates an exception to the FAA's presumption of enforceability "upon such grounds as exist at law or in equity for the revocation of any contract" 9 U.S.C. § 2, and both decisions ignored this Court's pronouncement that arbitration agreements must be enforced according to their terms "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citing *Shearson/Am. Express v. McMahon*, 107 S. Ct. 2332, 2337 (1987)).

In particular, the Seventh Circuit concluded that performing the contrary congressional command analysis required by this Court in *CompuCredit* and earlier cases would "put[] the cart before the horse" and instead began its analysis with the NLRA, and determining that the "concerted activities" protected by NLRA Section 7 included "filing a collective or class action suit." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1156 (7th Cir. 2016). The court then concluded that because "the provision at issue is unlawful under Section 7," it "meets the criteria of the FAA's savings clause for non-enforcement." *Id.* at 1157. Similarly, the Ninth Circuit concluded that NLRA Section 7 creates a "substantive right" to the collective pursuit of "work-related legal

claims" and that an employment arbitration agreement with a class or collective action waiver "interferes with" concerted legal action, and "cannot be enforced." *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980-984 (9th Cir. 2016). Like the Seventh Circuit, the Ninth Circuit relied on the FAA's savings clause to conclude that the FAA "does not dictate a contrary result." *Id.* at 984.

Had the Seventh and Ninth Circuits correctly applied *CompuCredit*'s rule requiring a contrary congressional command to override the FAA's mandate that arbitration agreements be enforced according to their terms, there can be no doubt that the arbitration agreements at issue would be enforceable. The NLRA lacks a "contrary congressional command" that could suffice to override the FAA, and NLRA Sections 7 and 8 not only fail to discuss arbitration, but also fail to discuss any employee rights to pursue litigation. Although employment-related litigation *may* constitute protected activity under Section 7, this possibility does not permit courts to elevate the NLRA over the clear congressional policy preference in favor of arbitration expressed in the FAA. The Court should accordingly reject the Seventh and Ninth Circuits' reversal of its holding in *CompuCredit* and reaffirm the FAA's requirement that arbitration agreements be enforced according to their terms unless Congress clearly expresses a command to the contrary.

The Seventh and the Ninth Circuits were wrong to invert *CompuCredit*'s analytical framework by beginning with another statute – in this case the NLRA

– and concluding that because the right to concerted activity under the NLRA could include group litigation in some circumstances, a waiver of the right to arbitrate employment claims as a group was unlawful and therefore unenforceable under the FAA's savings clause. In so holding, both courts rendered *CompuCredit* a nullity and relegated the FAA to a second-class statute, while introducing considerable uncertainty into the enforcement of arbitration agreements that may be in tension with other federal statutes. This Court should reverse these decisions and restore the contrary congressional command test.

II. The Unpredictability Created by the Seventh and Ninth Circuits' Decisions Will Reverberate Beyond Employment Cases.

This Court's requirement that courts enforce arbitration agreements according to their terms unless a contrary congressional command requires otherwise builds on the reasonable principle, expressed by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that, "having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 26. This approach fosters predictability regarding the enforcement of arbitration agreements because "if such an intention exists, it will be discoverable in the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration

and the [federal statute's] underlying purposes." *Id.* In other words, for another federal statute to trump the FAA's instructions that arbitration agreements must be enforced according to their terms, that statute must itself express a "contrary congressional command." *CompuCredit*, 132 S. Ct. at 669.

Neither Section 7 nor Section 8 of the NLRA mentions arbitration or any other right of employees to pursue legal action, either individually or as part of a group. *See* 29 U.S.C. §§ 157-158. When faced with federal statutes that are similarly silent regarding arbitration, this Court has consistently declined to infer an attempt to defeat the FAA's enforcement mandate. *See, e.g., Italian Colors Rest.*, 133 S. Ct. at 2309 (2013) (enforcing arbitration agreement in antitrust context and noting that "[t]he Sherman and Clayton Acts make no mention of class actions"); *CompuCredit*, 132 S. Ct. at 669. Similarly, this Court will not infer an intent to preclude individual arbitration agreements from statutory language that expressly authorizes class or collective actions. For example, in *Gilmer*, the Court noted that the Age Discrimination in Employment Act expressly "provid[ed] for the possibility of bringing a collective action," but cautioned that this express authorization "does not mean that individual attempts at conciliation were intended to be barred." 500 U.S. at 32. Rather, the Court found that the ADEA offered a "flexible approach to resolution of claims" which did not exclude the possibility of individual arbitrations. *Id.* at 29-31.

In endorsing the NLRB's attempt to upend this and the Court's other FAA jurisprudence, the Seventh and Ninth Circuits have opened up the FAA's savings clause to any manner of "illegality" defenses gleaned from other statutes that might be used to render arbitration agreements unenforceable. Nothing in this reasoning limits it to employment agreements and the NLRA – which means it could threaten arbitration agreements in a wide range of contexts. For example, the Federal Trade Commission (FTC) recently affirmed its position that the Magnuson-Moss Warranty Act (MMWA) prohibits mandatory binding arbitration in some consumer warranty disputes, even though the MMWA contains no contrary congressional command to override the FAA nor does it directly address binding arbitration or discuss the FAA. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen In the 2015 Magnuson-Moss Warranty Act Review, Project No. P114406, 80 Fed. Reg. 42710 (May 21, 2015). Although no federal court of appeals has endorsed this position, and two have rejected it, *see Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), the approach endorsed by Seventh and Ninth Circuits would encourage agencies like the FTC to carve out exceptions to the FAA through administrative rulemaking, which could then be used by Courts to preclude enforcement of the FAA through the Seventh and Ninth Circuits' interpretation of the FAA's savings clause.

The reasoning of the Seventh and Ninth Circuits' decisions would also provide a strong incentive for parties to offer strained readings of statutes to create "illegality" defenses to arbitration, despite the absence of a clear congressional command in the statute at issue. Currently, such challenges are easily – and correctly – dispensed with in light of *CompuCredit*'s insistence on a contrary congressional command to override the FAA. *See, e.g.*, *United States v. Int'l Fid. Ins. Co.*, No. 16-0472-WS-C, 2017 U.S. Dist. LEXIS 16791 (S.D. Ala. Feb. 7, 2017) (rejecting argument that Miller Act precludes arbitration of contractor disputes); *Howse v. DirectTV, LLC*, No. 6:16-cv-594-Orl-40TBS, 2016 U.S. Dist. LEXIS 150372 (M.D. Fla. Oct. 31, 2016) (rejecting argument that Electronic Funds Transfer Act evinces congressional intent to preclude arbitration). But these and other disputes would face considerable uncertainty if the Seventh and Ninth Circuits' rejection of *CompuCredit*'s bright-line rule remains in place.

CONCLUSION

For the foregoing reasons and for those expressed in Petitioners' merits brief in case numbers 16-285 and 16-300, and Respondent Murphy Oil's brief in case number 16-307, the decisions of the Seventh and Ninth Circuit should be reversed and that of the Fifth Circuit affirmed.

Respectfully submitted,

MARY-CHRISTINE SUNGAILA
Counsel of Record
HAYNES AND BOONE, LLP
600 Anton Blvd., Suite 700
Costa Mesa, CA 92626
(949) 202-3062
MC.Sungaila@haynesboone.com

ALEX R. STEVENS
HAYNES AND BOONE, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
(214) 651-5475
Alex.Stevens@haynesboone.com

Counsel for Amicus Curiae International Association of Defense Counsel

RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

FILED
AUG 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF LABOR LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS IN Nos. 16-285 & 16-300 AND PETITIONER IN No. 16-307

MATTHEW W. FINKIN
UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, Illinois 61820
(217) 383-3884

DAVID C. FREDERICK
Counsel of Record
JEREMY S.B. NEWMAN
BENJAMIN D. MARGO
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

August 16, 2017

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors long engaged in the study and teaching of labor law. All of them have published articles about the relationship between federal labor law – in particular, the Norris-LaGuardia Act of 1932 ("Norris-LaGuardia") and the National Labor Relations Act of 1935 ("NLRA") – and the Federal Arbitration Act of 1925 ("FAA").[2]

Amici's interest here derives from their responsibilities as law professors. *Amici* teach students to understand the law as a system faithful to professional standards of analytical care, and they emphasize that statutes must be read with close attention to their texts, histories, and policies to achieve their legislated ends. *Amici* believe that fidelity to those standards compels the conclusion that Norris-LaGuardia precludes

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

[2] *See* Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 Berkeley J. Emp. & Lab. L. 175 (2014); Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 St. John's L. Rev. 447 (2012); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173 (2003); Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Disc. 164 (2013); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013).

judicial enforcement of the provisions in the employment arbitration agreements of petitioners Epic Systems Corporation, Ernst & Young LLP and Ernst & Young U.S. LLP, and respondent Murphy Oil USA, Inc. (collectively, "Employers") that prohibit their employees from pursuing adjudication or arbitration of workplace claims on a joint, class, collective, or representative action basis.[3]

Amici are listed below in alphabetical order. Their institutional affiliations are provided for identification purposes only:

Matthew W. Finkin, Albert J. Harno and Edward W. Cleary Chair in Law, University of Illinois College of Law;

Catherine Fisk, Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley Law;

Julius G. Getman, Earl E. Sheffield Regents Chair Emeritus, University of Texas School of Law;

Timothy P. Glynn, Senior Associate Dean and Andrew J. Catania Endowed Professor of Law, Seton Hall University School of Law;

Ann C. Hodges, Professor of Law, University of Richmond;

Katherine V.W. Stone, Arjay and Frances Fearing Miller Distinguished Professor of Law, University of California, Los Angeles School of Law; and

Charles A. Sullivan, Senior Associate Dean and Professor of Law, Seton Hall University School of Law.

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[3] *Amici* also agree with petitioner National Labor Relations Board ("NLRB") and respondents Sheila Hobson, Jacob Lewis, Stephen Morris, and Kelly McDaniel (collectively, "Employees") that these prohibitions on concerted action are unlawful and unenforceable under the NLRA. Because the NLRB's and Employees' briefs fully address the NLRA, *amici* focus exclusively on Norris-LaGuardia.

SUMMARY OF ARGUMENT

The Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.* ("Norris-LaGuardia" or "the Act"), bars enforcement of contracts that forbid employees from engaging in concerted activities for their mutual aid or protection, including concerted pursuit of legal claims. Section 2 of the Act declares as "the public policy of the United States" that "the individual unorganized worker . . . shall be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of . . . mutual aid or protection." *Id.* § 102. Section 3 makes such contracts, commonly known as "yellow-dog contracts," unenforceable in federal court. *Id.* § 103.

The plain language of Norris-LaGuardia renders unenforceable the specific type of contract at issue in these cases – employment agreements prospectively waiving the right to act in concert with fellow employees to pursue legal claims to vindicate workplace rights. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). The contract clauses at issue purport to waive employees' rights to engage in certain concerted activity such as bringing "any group, class or collective action claim in arbitration or any other forum," Epic/Murphy Oil JA11, "any class, collective, or representative proceeding," Epic Pet. App. 31a, or "[a]ll claims, controversies or other disputes between [Employers] and an [e]mployee that could otherwise be resolved by a court," Ernst & Young Pet. Br. 7 (first and third alteration in original). Under these provisions, employment disputes can be brought only through bilateral arbitration between the employee and employer; these contracts purport to forbid concerted pursuit of legal claims by employees.

Beyond the plain text, *amici*'s historical research confirms that the contracts at issue here fall into the broad category of contractual restrictions on concerted employee activities that Congress targeted in the Act. A wide variety of yellow-dog contracts were enforced before Norris-LaGuardia, and Congress intended to bar all of them from enforcement, not just contracts restricting unionization.

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), does not save these contracts from Norris-LaGuardia's enforcement bar. Sections 2 and 3 of Norris-LaGuardia render unenforceable contracts that restrain employees' engagement in concerted activities for their mutual aid or protection by limiting them to individual claims to vindicate workplace rights. The FAA, as Employers interpret it, mandates the enforcement of the very same yellow-dog contracts because the restriction on concerted activities is paired with an arbitration requirement. If Employers' interpretation of the FAA were correct, there would be an irreconcilable conflict between the two statutes, and the later-enacted Norris-LaGuardia Act would prevail.

Further, Norris-LaGuardia's express terms dictate what must be done should any other federal law appear to mandate actions contrary to the policy it announces. It provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115.

In fact, there is no conflict. The FAA's saving clause, 9 U.S.C. § 2, exempts from the FAA contracts unenforceable under general contract defenses, such as illegality or voidness for conflict with public policy. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA "make[s] arbitration agreements as enforceable as other

contracts, but not more so"). The concerted-action waivers in question are unenforceable under generally applicable contract defenses because they violate "the public policy of the United States," 29 U.S.C. § 102, and are made unenforceable by statute, *id.* § 103. Employers do not contest these points. In fact, they ignore Norris-LaGuardia almost entirely. But the Act is dispositive; it squarely addresses the type of concerted-action waivers at issue in these cases and makes them unenforceable.

ARGUMENT

I. NORRIS-LAGUARDIA BARS ENFORCEMENT OF CONTRACTS THAT PREVENT EMPLOYEES FROM BRINGING JOINT OR COLLECTIVE LEGAL CLAIMS TO ENFORCE WORKPLACE RIGHTS

Though ignored almost completely by Employers and their *amici*, Norris-LaGuardia is fatal to their arguments. Norris-LaGuardia speaks to the heart of these cases – contracts imposed by employers prospectively waiving the concerted-action rights recognized by federal statutes. Norris-LaGuardia declares such contracts to violate the public policy of the United States and makes them unenforceable in federal court.[4]

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[4] Although the courts of appeals did not engage with Norris-LaGuardia in the decisions below, the NLRB recognized that it "aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity." *In re D.R. Horton, Inc.*, 357 NLRB 2277, 2281 (2012), *enf. granted in part, rev'd in part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Indeed, Norris-LaGuardia provided the textual grounding for the later-enacted NLRA, which "built upon and expanded the policies reflected in the Norris-LaGuardia Act." *Id.* at 2282.

A. The Plain Language Of Sections 2 And 3 Of Norris-LaGuardia Prohibits Enforcement Of Contractual Restrictions On Concerted Legal Claims By Employees

Read together, sections 2 and 3 of Norris-LaGuardia preclude judicial enforcement of the concerted-action waivers at issue in these cases. Section 2 establishes a public policy against any interference with workers' "other concerted activities for the purpose of . . . other mutual aid or protection," which plainly covers joint, class, collective, or representative action to vindicate workers' rights. Section 3 plainly states that contracts violating that policy are unenforceable.

Section 2 declares as "the public policy of the United States" that:

> Whereas under prevailing economic conditions, . . . ***the individual unorganized worker*** is commonly helpless to exercise actual liberty of contract . . . , wherefore, . . . ***it is necessary*** . . . ***that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents***, in the designation of such representatives or in self-organization or ***in other concerted activities for the purpose of*** collective bargaining or ***other mutual aid or protection***; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102 (emphases added). Any contract with "employers of labor, or their agents," that constitutes "interference, restraint, or coercion" of an "individual unorganized worker" affecting his or her participation "in other concerted activities for the purpose of . . . mutual aid or protection" violates this federal policy. *Id.*

The category of "*other* concerted activities" by its terms encompasses something broader than joining or organizing a union. *Id.* (emphasis added). Indeed, if it was not broader than "self-organization," *id.*, the phrase would be superfluous. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Section 3 establishes that "any other undertaking or promise in conflict with the public policy declared in section [2] . . . shall not be enforceable in any court of the United States." 29 U.S.C. § 103. That is, contracts restricting employees' rights to engage in concerted activities for mutual aid or protection are unenforceable.[5] This is one of two categories of employer-employee agreements made unenforceable by section 3, the other being any one in which a worker "undertakes or promises not to join, become, or remain a member of any labor organization." *Id.* The distinction between the two categories of unenforceable agreements makes clear that the category of "any other undertaking or promise in conflict with the public policy declared in section [2]" encompasses a broader range of agreements than contracts restricting unionization. *Id.*

By its terms, "other concerted activities for the purpose of . . . mutual aid or protection," *id.* § 102, includes employees acting in concert to bring claims for resolution by a judge or arbitrator to protect their

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[5] So intent was Congress on preventing employers from forcing employees to forgo their right to engage in concerted activities for their mutual aid or protection that Norris-LaGuardia addressed not just contracts but also any "undertaking or promise," thus ensuring that any such promise would not be enforceable in federal court, regardless of whether it constituted a valid contract under state law.

shared workplace rights (or an employee bringing such a claim on behalf of other employees). Norris-LaGuardia does not define "other concerted activities" or "mutual aid or protection," so ordinary meaning controls, *see Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014), "[a]bsent a clearly expressed legislative intention to the contrary," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

"Concerted activities" plainly includes employees bringing a grievance, complaint, or action together. Under any reasonable interpretation, such a joint legal claim is an "activity" that is "concerted," and Employers offer no plausible contrary reading of those words. And when employees act in concert to bring legal claims to vindicate workplace rights – such as their right under the Fair Labor Standards Act of 1938 to overtime pay or wages for time spent on work activities – they clearly do so for the purpose of "mutual aid or protection." 29 U.S.C. § 102. The employees involved seek reciprocal benefit. The participation of each one benefits the others (*i.e.*, provides "aid") by spreading the costs of litigation or arbitration, and potentially achieving an outcome that benefits many employees (*e.g.*, obtaining damages for multiple claimants and thus deterring the employer from committing similar violations). Through joint or collective claims, employees also provide each other with "mutual . . . protection" because strength in numbers shields them from retaliation, and such claims can protect all employees from further violations.[6]

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[6] *See Mutual*, BLACK'S LAW DICTIONARY 800 (2d ed. 1910) ("[i]nterchangeable; reciprocal; each acting in return or correspondence to the other; given and received"); *Mutual*, BLACK'S LAW DICTIONARY 1218 (3d ed. 1933) (same); *Mutual Aid*,

The plain meaning of this language is confirmed by precedent. This Court has held that "concerted activities for the purpose of . . . mutual aid or protection" encompasses efforts "to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). Every court of appeals to consider the question has agreed.[7] These cases interpret section 7 of the NLRA, which contains language derived from Norris-LaGuardia.[8]

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1618 (2d ed. 1934) ("[r]eciprocal aid among men in social groups").

[7] *See NLRB v. Alternative Entm't, Inc.*, 858 F.3d 393, 402-03 (6th Cir. 2017) ("[c]oncerted activity" includes pursuit of employment claims "in *all* forums, arbitral and judicial"); Ernst & Young Pet. App. 10a ("'mutual aid or protection clause'" of the NLRA "includes the substantive right to collectively 'seek to improve working conditions through resort to administrative and judicial forums'"); Epic Pet. App. 5a ("Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'"); *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) ("mutual aid or protection" clause protects collective action in litigation); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("[g]enerally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA"); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7").

[8] Section 7 of the NLRA declares that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. As the Senate Report to an early draft of the NLRA made plain: "The first unfair labor practice restates

Section 4 of Norris-LaGuardia provides further textual support for the conclusion that Congress intended the Act to protect the concerted prosecution of legal claims. Section 4 deprives federal courts of jurisdiction to enjoin participation, "whether singly or in concert," in a set of enumerated actions to advance workplace rights. 29 U.S.C. § 104. Subsection (d) bars injunctions against "all lawful means aiding any person participating or interested in any labor dispute who is . . . prosecuting[] *any action or suit in any court* of the United States or of any State." *Id.* § 104(d) (emphasis added). Congress thus recognized bringing a lawsuit as a protected right of workers, on par with striking, *id.* § 104(a), "[b]ecoming or remaining a member of any labor organization," *id.* § 104(b), and picketing, *id.* § 104(f).

Epic and Murphy Oil incorrectly maintain that section 4 supports them. They argue (at 38-39) that "[a]ll of the activities specified in section 4 were things employees could do on their own" rather than "obligating a tribunal or employer to treat them as a class." But their characterization that Employees contend that a tribunal is "obligat[ed] . . . to treat [employees] as a class" is a strawman. The protected right is to *pursue* concerted legal claims, which is something employees can "do on their own." Neither the NLRA nor Norris-LaGuardia guarantees that such claims can proceed as a class action. Class treatment can be denied under Rule 23 or any generally applicable

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the familiar law already enacted by Congress in section 2 of the Norris-La Guardia Act[,] . . . rights which are admitted everywhere to be the basis of industrial no less than political democracy." S. Rep. No. 73-1184, at 4 (1934).

procedural rules, just not based on illegal contracts that forbid concerted activities.[9]

Epic and Murphy Oil further argue (at 39) that "none of the specified activities [in section 4] had anything to do with class proceedings," so "there is no reason to think Congress intended 'concerted activities' to include class proceedings." Employers misrepresent their own agreements and ignore the statute's plain text. The clauses that Employers seek to enforce restrict not just "class" proceedings but any litigation or arbitration filed or joined by more than one employee. Such joint claims are clearly encompassed within section 4, which addresses participation in litigation, "whether singly or in concert." 29 U.S.C. § 104. Moreover, Employers provide no justification for their assumption that the "concerted activities" protected from employer action in NLRA §§ 7 and 8 and yellow-dog contracts in Norris-LaGuardia §§ 2 and 3 are limited to the set of practices protected from injunctions in Norris-LaGuardia § 4. Employers' nontextual reading of section 4 provides no justification for this Court to revisit its holding in *Eastex* that the "concerted activities for . . . mutual aid or protection" language in NLRA § 7 (which derives from Norris-LaGuardia § 2) includes joint pursuit of legal claims.

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[9] *See, e.g., D.R. Horton*, 357 NLRB at 2286 n.24 ("Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and their employer remains free to assert any and all arguments against certification (other than the [unlawful waiver]).").

B. The History Of Norris-LaGuardia Shows That Congress Intended To Render Unenforceable Contracts Restricting Any Concerted Activities To Advance Employee Interests, Including Joint Legal Claims

The historical context and legislative history of Norris-LaGuardia reinforce the conclusion compelled by the statutory text.

Congress enacted Norris-LaGuardia to remedy the decades-old management practice of requiring workers to submit to contract terms prohibiting them from engaging in concerted activities for their mutual aid or protection (including, but not limited to, joining unions). *See* Finkin, 93 Neb. L. Rev. at 9-17; *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 397-400 (2014) (Werdegar, J., concurring and dissenting) (describing Norris-LaGuardia's history), *cert. denied*, 135 S. Ct. 1155 (2015).

Congress's initial efforts to regulate employers' imposition of such terms on workers were struck down in a series of *Lochner*-era cases as an impermissible infringement on employers' "freedom of contract." *See, e.g., Adair v. United States*, 208 U.S. 161, 172-76 (1908); *see also Coppage v. Kansas*, 236 U.S. 1, 9-14 (1915) (striking down similar state legislation). In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), the Supreme Court gave its express imprimatur to the enforceability of such yellow-dog contracts, upholding an injunction against collective organizing efforts on the ground that such contracts gave employers an enforceable property right.

Congress enacted Norris-LaGuardia in 1932 to address the same problem in a different way: by eliminating the authority of the federal courts to enforce such agreements. *See* 29 U.S.C. § 103; *see generally*

IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, Ch. 11 (1969). As the Senate Report states, "[o]ne of the objects of this legislation is to outlaw this 'yellow dog' contract." S. Rep. No. 72-163, at 15 (1932); *see also* H.R. Rep. No. 72-669, at 6 (1932) ("Section 3 is designed to outlaw the so-called yellow-dog contract."); *see generally* JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT (1932) (contemporaneous doctoral dissertation on history and content of yellow-dog contracts).

The phrase "yellow-dog contract" encompasses more than agreements that forbid employees from joining unions; it applies to all contracts that restricted employees from concerted pursuit of workplace rights. The term was first applied to leases of company housing in mining towns that prohibited anyone other than the miners' immediate family members, doctors, and morticians from having access to miners' homes, on pain of eviction. *See* Seidman at 31. Mining companies feared that allowing miners to talk to union organizers – or even to fellow workers in the privacy of the home – might lead to group action.[10]

Because *Hitchman Coal* opened the door to judicial enforcement of all manner of yellow-dog contracts, "[a]n almost endless array of legal games were played by employers that made almost all collective action by workers susceptible to legal prohibitions." DANIEL JACOBY, LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA 62 (1998). These included employer-mandated promises "to adjust any

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[10] The United States Coal Commission of 1922 condemned the "yellow dog" leases used by mining companies in its report, "Civil Liberties in the Coal Fields." U.S. COAL COMM'N, S. Doc. No. 68-195, REPORT OF THE UNITED STATES COAL COMM'N, pt. 1, at 169-70 (1925).

dispute that might arise by individual bargaining," as, for example, by waitresses at the Exchange Bakery & Restaurant in New York City; to renounce any "concerted action [with co-workers] with a view to securing greater compensation" at the Moline Plow Company; or to "arbitrate all differences" according to the machinery set up by the employer and its company union at United Railways & Electronic Company. Seidman at 58-60, 66, 69. A contract offered by the Clinton Saddlery Company provided: "No employee can unite with his fellow workers in any effort to regulate wages, hours, etc." *Id.* at 65.

Congress was well aware of the breadth of these contractual limitations on group efforts, and it enacted Norris-LaGuardia to outlaw the full gamut of such "yellow dog" contracts. As the Senate Report made clear, "[n]ot all of these contracts are the same, but . . . [i]n all of them the employee waives his right of free association . . . in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, at 14. In fact, just two years before adoption of Norris-LaGuardia, Senator William E. Borah answered the question "[W]hat is [a] 'yellow dog' contract?" on the Senate floor by citing one that provided: "I agree during employment under this contract that I . . . will not . . . unite with employees in concerted action to change hours, wages, or working conditions." 72 Cong. Rec. 7931 (Apr. 29, 1930).[11]

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[11] Senator Borah and several colleagues, including Senators Norris and Wagner, spoke at length about yellow-dog contracts in the successful opposition to the nomination of Judge John J. Parker in 1930 to be a Supreme Court Justice. The opposition centered on Judge Parker's affirmance of an injunction against striking miners who had signed a yellow-dog contract. *See International Org., United Mine Workers v. Red Jacket Consol.*

Congress thus intended all promises or undertakings that restricted employees to a course of individual dealing with their employer to be extirpated as fully as possible under federal law.

C. Enforcement Of Waivers Of Concerted Legal Claims Offends The Policy Of Norris-LaGuardia

Norris-LaGuardia's statement of "the public policy of the United States" rests on Congress's finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract." 29 U.S.C. § 102. For that reason, the Act declares as "the public policy of the United States" that "it is necessary" that an employee "have full freedom of association . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of . . . mutual aid or protection." *Id.* That express statement of public policy was a direct response to widespread efforts by employers at the time to require worker grievances to be presented exclusively on an individual basis. The policy is as relevant now as it was in 1932. Where wage and hour violations are widespread but individual instances

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Coal & Coke Co., 18 F.2d 839, 849 (4th Cir. 1927). Several of the speeches informed Senators of the variety of yellow-dog contracts. *See, e.g.*, 72 Cong. Rec. 6574-79 (Apr. 7, 1930); *id.* at 7932 (Apr. 29, 1930) (remarks of Sen. Borah) (citing Exchange Bakery contract described in text *supra* pp. 13-14). In fact, Senator Norris spoke specifically about the use of yellow-dog contracts to preclude concerted legal action: "It would enjoin anyone from coming to our aid, from furnishing an appeal bond." 72 Cong. Rec. 8191 (May 2, 1930). The legislative record in 1930, fast upon Congress's initial failure to enact Norris-LaGuardia in 1928 and just prior to its subsequent enactment in 1932, further evidences Congress's contemporaneous understanding of what its law was designed to prohibit.

involve small amounts, or where fear of employer retaliation or lack of access to qualified counsel is pervasive, aggregation of claims may be the only means of protecting workers.

In this way, Congress opposed what it saw as the *Lochner*-era judiciary's single-minded promotion of "liberty of contract." S. Rep. No. 72-163, at 15; *see Lochner v. New York*, 198 U.S. 45, 57 (1905); *see generally* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 Lab. Hist. 251, 251-52 (1989).[12] The Supreme Court has long understood Norris-LaGuardia to repudiate that embrace, which it characterized in hindsight as the courts' "'self-mesmerized views of economic and social theory.'" *Burlington N.R.R. Co. v. Brotherhood of Maint. of Way Emps.*, 481 U.S. 429, 453 (1987) (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969)).

It was and remains the public policy of the United States that employees should be free to join together in making common cause in any matter of work-place rights, without interference by their employer. Norris-LaGuardia conceives of that right as substantive, a civil liberty insulated from any promise or

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[12] As stated in the debate on Norris-LaGuardia:

> This [freedom-of-contract] doctrine presupposes that the girl who seeks a position in a department store, and the owner of that store deal with each other on terms of equality. She is free to work or not to work; he is free to employ or not to employ her.
>
> Or, to take another illustration, that a worker seeking employment with the United States Steel Corporation and the manager, acting for the corporation, deal on terms of equality. One who still believes that will believe anything.

75 Cong. Rec. 5515 (Mar. 8, 1932) (remarks of Rep. Schneider).

undertaking that would blunt its exercise. As Senator Norris stated, "Human liberty is at stake." 72 Cong. Rec. 8190 (May 2, 1930). Congress viewed the right of employees to act in concert as no less a substantive right than the First Amendment right "peaceably to assemble."

The statutory language and history establish that Norris-LaGuardia's policy guaranteeing the right to concerted activity is not limited to joining a union or engaging in collective bargaining, but extends to collective efforts to enforce workplace rights. As this Court has recognized, rights to earned wages "bear[] such a relation to employees' interests as to come within the guarantee of the 'mutual aid or protection' clause." *Eastex*, 437 U.S. at 569.

Any promise or undertaking by which an employee abjures his future right to engage in concerted legal action directly conflicts with the express federal policy declared in Norris-LaGuardia and is unenforceable by "any court of the United States." 29 U.S.C. § 103.[13]

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[13] In an effort to escape the application of Norris-LaGuardia, Employers may point to *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457-59 (1957) (citing Norris-LaGuardia § 7). That case was unrelated to the non-enforceability of concerted-action waivers under sections 2 and 3 of the Act. *Lincoln Mills* concerned whether the "stiff procedural requirements for issuing an injunction in a labor dispute" under section 7 were intended to prevent a court from enforcing an employer's promise to arbitrate disputes with a union. *Id.* at 458. Sections 2 and 3 were not mentioned in *Lincoln Mills*, which is unsurprising, because that case involved the prospect of arbitration by a labor union as the collective representative of employees, not what is at issue here – the putative waiver of the right to collective action in the first instance. Section 2 denounces "yellow dog" contracts because they disadvantage the "individual unorganized worker[s]"

D. The Retail Litigation Center Misconstrues The Norris-LaGuardia Act And Ignores Its Purpose

Norris-LaGuardia plays a critical role in these cases because it circumscribes the jurisdiction of the federal

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who sign them, 29 U.S.C. § 102, a concern entirely absent when the contracting party is a labor union.

Similarly, *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), is not in tension with the position advanced here. That case involved the anti-injunction provisions of Norris-LaGuardia and the provision of the later-enacted Labor Management Relations Act, 1947 ("LMRA") that permitted suits in federal court to enforce contracts between employers and labor organizations. The question in *Boys Markets* was whether Norris-LaGuardia's anti-injunction provision prohibited federal courts from ordering a union not to strike, if the union had entered into a collective-bargaining agreement with a no-strike provision and an arbitration provision that encompassed the underlying grievance. In holding that Norris-LaGuardia did not prohibit judicial enforcement of the no-strike clause in those circumstances, the Supreme Court stated that the literal terms of Norris-LaGuardia's anti-injunction provision "must be accommodated to the subsequently enacted provisions of [the LMRA]" because "[s]tatutory interpretation requires . . . consideration [of] the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Id.* at 250.

Here, there is nothing in the FAA that Norris-LaGuardia must "accommodate[]" because the FAA's saving clause excludes contracts subject to the general contract defenses of illegality and conflict with public policy. *See infra* Part II.A. Moreover, while *Boys Market* favored the LMRA as a statute enacted later than Norris-LaGuardia, as between the FAA and Norris-LaGuardia, Norris-LaGuardia would take precedence in any conflict as the later-enacted statute. Indeed, Norris-LaGuardia expressly provides for the *pro tanto* repeal of any previously enacted statute with which it comes into conflict. 29 U.S.C. § 115. Finally, *Boys Markets* concerned Norris-LaGuardia's anti-injunction provisions; because no contract with an employee restricting concerted activities was at issue, sections 2 and 3 were irrelevant, and *Boys Markets* did not purport to interpret those provisions.

courts over the relief Employers seek – enforcement of their agreements. Nevertheless, Employers have chosen to ignore it. *See supra* p. 11. Only one *amicus* in support of Employers seeks to fill this gap, and it ignores both the plain text of the statute and its purpose. *See* Retail Litigation Center Br. 28-30. Retail Litigation Center argues that the purpose of sections 2 and 3 was to prevent "'agreements stating that the workers were not and would not become labor union members'" and that "[t]he comparison to an arbitration agreement is absurd" because "[a]n arbitration agreement does not inhibit unionization." *Id.* at 29 (quoting *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 534 (1949)). But Norris-LaGuardia § 3 does not bar enforcement only of contracts "not to join, become, or remain a member of" a union; it also bars contracts "in conflict with the public policy declared in section [2]," which protects the right to engage in all "concerted activities" for employees' "mutual aid or protection." 29 U.S.C. §§ 102, 103. Retail Litigation Center simply ignores language that contradicts its reading, and it attempts to read it out of the statute. Moreover, as shown above, *supra* Part I.B, Norris-LaGuardia's purpose was to ban a wide variety of contracts restricting concerted activities and was not limited to unionization.[14]

Retail Litigation Center also attempts to excise out of Norris-LaGuardia most of section 4, claiming (at 29) that the section only prevents courts from "enjoining strikes" and "protect[s] picketers, not class plaintiffs."

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[14] *Northwestern Iron* does not mention Norris-LaGuardia. It merely states that contracts banning employees from joining unions were one type of "yellow dog contract[]" covered by state and federal labor laws. 335 U.S. at 534.

It ignores that section 4 bars injunctions of nine separate activities, including participation in litigation. *See* 29 U.S.C. § 104(d); *supra* p. 10. Although Retail Litigation Center (at 30) condemns the NLRB's reliance on Norris-LaGuardia as "revisionist history," it in fact offers the ahistorical reading of Norris-LaGuardia, ignoring the pertinent provisions of the statute.

II. THE FAA DOES NOT MANDATE ENFORCEMENT OF CONTRACTS THAT ARE UNENFORCEABLE UNDER NORRIS-LAGUARDIA

A. The FAA's Saving Clause Exempts Contracts That Violate Norris-LaGuardia From The FAA

Properly understood, there is no conflict between the FAA and Norris-LaGuardia. The FAA does not require enforcement of contractual terms that are unlawful and contrary to public policy. The two statutes can be harmonized through the FAA's saving clause.

Under the FAA's saving clause, an agreement to arbitrate is enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Illegality and inconsistency with statutorily prescribed public policy are and were widely recognized general contract defenses, both at the time of the FAA's enactment and today. *See* Restatement (First) of Contracts § 512 (1932) ("A bargain is illegal within the meaning of the Restatement of this Subject if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."); *see also* Restatement (Second) of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed

in the circumstances by a public policy against the enforcement of such terms."). Norris-LaGuardia both provides that contracts restricting concerted activities by employees are unenforceable and declares such contracts to be against "the public policy of the United States." 29 U.S.C. §§ 102, 103. These contracts are thus unenforceable under the general contract defenses of illegality and public policy. *See* Epic Pet. App. 14a-15a.

The doctrine that contracts may be unenforceable if contrary to public policy or statute is "generally applicable," not one that is specifically "applied in a fashion that disfavors arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). An arbitration agreement contrary to federal policy and unenforceable under federal statute is just as unenforceable as any other illegal contract that is contrary to public policy. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("As the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

Concepcion is not to the contrary. In that case, this Court held that a state common-law doctrine forbidding class-arbitration waivers "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." 563 U.S. at 344. But the FAA's saving clause confirms what a straightforward application of the generally applicable illegality defense already requires: the FAA does not require enforcement of contract terms that purport to eliminate the federal substantive right to "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102.

Unlike the *Discover Bank* doctrine invalidated in *Concepcion*,[15] Norris-LaGuardia is supportive of, rather than hostile to, arbitration. Section 8 of Norris-LaGuardia facilitates "voluntary arbitration" of labor disputes. 29 U.S.C. § 108. Decades of experience of labor arbitration have shown that arbitration of collective employment claims is practical and efficient, and involves none of the "procedural morass" with which this Court was concerned in *Concepcion*. 563 U.S. at 348-50. *See generally* National Academy of Arbitrators Br.

Applying Norris-LaGuardia's ban on enforcement of yellow-dog contracts thus contravenes neither the text nor the pro-arbitration policy of the FAA.

B. Insofar As The FAA Is Read To Require Enforcement Of Employment Contracts Mandating Bilateral Arbitration, It Would Be Superseded By Norris-LaGuardia

The clauses at issue are unenforceable under Norris-LaGuardia regardless of this Court's interpretation of the FAA's saving clause. Employers interpret the FAA to require enforcement of employment contracts mandating that all employment disputes be submitted to bilateral arbitration, with no joint or collective pursuit of legal claims in either a judicial or an arbitral forum permitted. *See, e.g.*, Epic/Murphy Oil Br. 18-29. If this interpretation of the FAA were correct (and, as shown above, *see supra* Part II.A, it is not), enforcement would nonetheless be barred by Norris-LaGuardia.

Under Employers' interpretation of the FAA, the FAA and Norris-LaGuardia are irreconcilable. Both

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[15] *See Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

the FAA and Norris-LaGuardia relate to the enforceability of contracts. The FAA makes one set of contracts (arbitration clauses in maritime or commercial contracts) "enforceable," 9 U.S.C. § 2, and Norris-LaGuardia states that another set of contracts (contracts restricting employee unionization or concerted activities for mutual aid or protection) "shall not be enforceable," 29 U.S.C. § 103. Although the sets of contracts covered by the two statutes are generally distinct, they intersect in the form of employment contracts requiring bilateral arbitration of all employment disputes. Such contracts are unenforceable under Norris-LaGuardia, *see supra* Part I, but (under Employers' view) enforceable under the FAA.

Any conflict between the two statutes must be resolved in favor of Norris-LaGuardia as the later-enacted statute. Most obviously, fidelity to the text of Norris-LaGuardia so requires because the statute expressly dictates what courts should do in the event of a conflict with another statute. It provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter [29 U.S.C. §§ 101-115] are repealed." 29 U.S.C. § 115.

And even absent this provision, settled principles of statutory interpretation require that, when two statutes "are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). The FAA was enacted in 1925 and Norris-LaGuardia in 1932. Thus, to the extent the FAA conflicts with Norris-LaGuardia, Norris-LaGuardia controls.

The FAA was codified as part of the re-codification of the United States Code in 1947, but re-codification by itself is not a substantive amendment. *See, e.g.*,

Finley v. United States, 490 U.S. 545, 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912). For purposes of applying the later-enacted statute canon, *see Posadas*, 296 U.S. at 503, the Supreme Court has held that a non-substantive re-enactment is not considered a later enactment, *see Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). As the NLRB pointed out, "[i]t seems inconceivable that legislation effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent." NLRB Pet. App. 52a. Thus, Norris-LaGuardia would take precedence over the FAA in the event of any conflict.

C. The FAA Does Not Take Precedence Over Norris-LaGuardia

Employers and their *amici* argue that, in the event of a conflict, the FAA should take precedence over the labor statutes. These arguments fail.

1. Epic and Murphy Oil argue (at 54) that the FAA should take precedence over the NLRA as the purportedly "more specific" statute (they do not address Norris-LaGuardia). Their argument rests on a selective quotation of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), which stated: "*Where there is no clear intention otherwise*, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51 (emphasis added). In Norris-LaGuardia, Congress expressed its clear intention that "[a]ll acts and parts of acts in conflict with [Norris-LaGuardia] are

repealed." 29 U.S.C. § 115. Thus, even if the FAA were deemed more specific, Norris-LaGuardia expressly repealed all earlier conflicting statutes.

In any event, Norris-LaGuardia is the more specific statute addressed to the question in these cases. Each statute declares that certain types of contractual clauses within its sphere (provisions restricting concerted activities for Norris-LaGuardia; arbitration clauses for the FAA) are either unenforceable (Norris-LaGuardia) or enforceable (FAA). But Norris-LaGuardia addresses a much narrower sphere: it applies specifically to employment contracts, 29 U.S.C. §§ 102, 103, whereas the FAA applies generally to all contracts "involving commerce" (and maritime contracts), 9 U.S.C. § 2.

2. Another group of law professors, who do not profess any expertise in labor law, appear as *amici* to argue that the FAA enjoys a special stature among federal statutes such that, "[i]f Congress does not expressly override the FAA, . . . then the federal statute cannot be construed to abrogate or amend the parties' arbitration agreement." Law Professors in Support of Employers Br. 10; *see also id.* at 9 (statute can limit FAA only if it "expressly precludes or limits arbitration"). Their assertion conflicts with this Court's clear holding that, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command," which can be shown by "the statute's text or legislative history or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (citation

and alteration omitted).[16] This Court has never so privileged the FAA as to impose a requirement that a statute must refer expressly to arbitration to override it. Such a requirement would violate the canon that "[t]he legislature cannot derogate from . . . the authority of its successors." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 278 (2012). This canon makes it "[im]permissible for a legislature to prescribe the only words that will be effective to produce an amendment." *Id.* at 279.[17]

Norris-LaGuardia contains a "congressional command" that employers may not "interfere[]" with or "restrain[]" concerted legal action by contract. 29 U.S.C. § 102; *see supra* Part I.A; *see also supra* Part I.B. The lack of an express reference to arbitration in Norris-LaGuardia does not obscure this clear intent.[18]

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[16] In fact, the "contrary congressional command" test does not apply here because these agreements purport to waive employees' substantive statutory rights to engage in concerted activities, and such waivers are unenforceable, even under the FAA. *See* Hobson Br. 49-50. But even if a "contrary congressional command" were required, it is present here.

[17] At most, the Court has suggested that, where two constructions of a statute are "in equipoise," a construction that does not restrict arbitration will be favored. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring in the judgment).

[18] There is no question, for example, that, under Title VII of the Civil Rights Act of 1964, employers may not enforce a racially discriminatory arbitration agreement on their employees, notwithstanding the lack of any reference to arbitration in that statute. Similarly, other civil rights statutes such as the Age Discrimination in Employment Act of 1967 or the Americans with Disabilities Act of 1990 would preclude enforcement of arbitration clauses that discriminated against the protected group, regardless of the lack of mention of arbitration. The result

After all, "the arbitration requirement" in these clauses "is not the problem"; the problem is the "ban on initiating, in any forum, concerted legal claims." Ernst & Young Pet. App. 12a. When Congress enacted Norris-LaGuardia, there was no reason to expect that employers would integrate arbitration clauses into yellow-dog contracts by pairing a restriction on concerted legal claims with an arbitration requirement.

Further, Congress had no reason to consider the FAA's application to workers over whom Congress (under then-prevailing precedent) had no power. When both the FAA and Norris-LaGuardia were enacted, "congressional authority to regulate under the commerce power was to a large extent confined by [Supreme Court] decisions" to the actual channels and instrumentalities of interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 116 (2001). Congress had power to regulate the terms and conditions of employment for only those workers whose work took them across state lines, and these workers it exempted. *Id.* It would be extraordinary to hold that, because Congress failed to anticipate both this Court's expansion of the commerce power and its application of the FAA three-quarters of a century

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should be no different here, not least because Norris-LaGuardia, like the antidiscrimination statutes, was conceived as a civil rights law. *See* 75 Cong. Rec. 4504 (Feb. 23, 1932) (remarks of Sen. Norris) ("He can not associate with his fellows. In connection with his fellows, he can not present a grievance to the employer. . . . He must singly present any grievance he has. . . . He has no opportunity to join with his fellows and make his demands effective. In effect, if he must live and support his family and clothe his children, he must surrender his liberty."). To give effect to its plain text and protect the substantive right of freedom of association, the Act need not expressly state that it cannot be short-circuited by an arbitration clause.

later, the law enacted in 1932 must be denied its plain meaning, its policy given no effect.

* * *

In the debate on Norris-LaGuardia, Representative Schneider expressed the hope that, even though the nation's emerging industrial and social problems would call for future legislative redress, "[a]t least, the problem of . . . 'yellow-dog' contracts will have been removed from the arena and we can then take up other questions." 75 Cong. Rec. 5515 (Mar. 8, 1932). Alas, the yellow-dog contract has re-entered the arena, and courts have not thus far fully engaged the law Congress fashioned precisely to eradicate this social evil. This Court should apply Norris-LaGuardia's protections according to their plain text, as Congress always intended.

CONCLUSION

The judgments of the Seventh Circuit in No. 16-285 and of the Ninth Circuit in No. 16-300 should be affirmed; the judgment of the Fifth Circuit in No. 16-307 should be reversed.

Respectfully submitted,

MATTHEW W. FINKIN
UNIVERSITY OF ILLINOIS
COLLEGE OF LAW
504 East Pennsylvania Ave.
Champaign, Illinois 61820
(217) 383-3884

DAVID C. FREDERICK
Counsel of Record
JEREMY S.B. NEWMAN
BENJAMIN D. MARGO
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

August 16, 2017

RECORD AND BRIEFS

Nos. 16-285, 16-300 and 16-307

IN THE

Supreme Court of the United States

FILED
N 16 2017
OFFICE OF THE CLERK

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,

v.

STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE SEVENTH, NINTH AND FIFTH CIRCUITS

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONERS IN 16-285 & 16-300 AND IN SUPPORT OF RESPONDENTS IN 16-307

THOMAS R. MCCARTHY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

Library of Congress

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INTEREST OF *AMICI CURIAE*

Amici curiae are or have been distinguished professors of law from several leading law schools across the country ("*Amici* Law Professors"). *Amici* Law Professors have lectured and written extensively on issues of contract law, arbitration, and statutory interpretation. They support the enforcement of arbitration clauses as written and oppose any construction of the National Labor Relations Act ("NLRA") that purports to effectuate a congressional override of the Federal Arbitration Act ("FAA") and bar the enforcement of arbitration agreements in employment contracts. *Amici* Law Professors believe that such a construction of the NLRA is foreclosed by the Court's precedents, *see, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and would run afoul of the FAA and its mandate that "[courts] rigorously enforce agreements to arbitrate," *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Amici Law Professors include:

Henry N. Butler, Dean and Professor of Law at the Antonin Scalia Law School, George Mason University.

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* No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief.

M. Todd Henderson, Michael J. Marks Professor of Law and Mark Claster Mamolen Research Scholar at the University of Chicago Law School.

Justin (Gus) Hurwitz, Assistant Professor of Law and Co-Director of Space, Cyber, and Telecom Law Program, University of Nebraska College of Law.

Michael I. Krauss, Professor of Law at the Antonin Scalia Law School, George Mason University.

Geoffrey Manne, Executive Director, International Center for Law & Economics, and former assistant professor of law, Lewis & Clark Law School.

Joshua D. Wright, University Professor of Law and Executive Director of the Global Antitrust Institute at the Antonin Scalia Law School, George Mason University.

INTRODCUTION AND SUMMARY OF THE ARGUMENT

The Court has recognized the many benefits of arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Moreover, the Court has underscored that, "for parties to employment contracts," these benefits are "real." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001); *see also id.* (rejecting the supposition that "the advantages of the arbitration process somehow disappear when transferred to the employment context"). In light of these benefits, businesses across the country and their employees regularly enter into employment contracts that provide for the arbitration of any disputes. *See id.* at 123; *see also* Brief for the Petitioners, *Ernst & Young LLP v. Morris*, No. 16-300 ("E&Y Brief") at 5-6 (citing Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 84 (1996)). And, as Petitioner Epic Systems and Respondent Murphy Oil point out, these contracts "often include waivers of class or collective proceedings," Br. for Pet. Epic Systems and Resp. Murphy Oil ("Epic/Murphy Br.") at 1, undoubtedly to ensure "the principal advantage of arbitration—its informality," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

The question presented is whether—notwithstanding the prevalence of arbitration agreements in the employment context and the many benefits thereof—the National Labor Relations Act

("NLRA") prohibits the enforcement under the Federal Arbitration Act ("FAA") of a contract requiring an employee to arbitrate claims against an employer on an individual basis.

Amici Law Professors agree with Petitioners in Nos. 285 and 300 and Respondents in No. 307 that the answer to this question is no. Because Congress did not in the NLRA clearly express an intention to override the FAA and preclude the enforcement of arbitration agreements in employment contracts, the FAA requires enforcement of the arbitration agreements at issue. *See* E&Y Br. at 26-32; Epic/Murphy Br. at 29-49. *Amici* Law Professors write separately to emphasize that the standard for demonstrating that another federal statute constitutes a "clear congressional override" of the FAA is an exacting one.

ARGUMENT

I. The FAA Requires Courts to Enforce Agreements to Arbitrate Federal Statutory Claims Unless the FAA's Mandate Has Been Overridden by a Contrary Congressional Command.

Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The statute "was designed to allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'" *Scherk v. Alberto-Culver Co.*, 417

U.S. 506, 510-11 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

The "centerpiece" of the FAA is Section 2. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). It provides:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. This provision declares "as a matter of federal law," *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 483 (1989), that "arbitration agreements [are] 'valid, irrevocable, and enforceable' as written," *Concepcion*, 563 U.S. at 344 (quoting 9 U.S.C. § 2).

The FAA and Section 2 thus embody an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (per curiam) (citation and quotations omitted), and establish "a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *see also Mitsubishi Motors*, 473 U.S. at 625 (explaining that the FAA and Section 2 outline "a policy guaranteeing the enforcement of private contractual arrangements"). This Court has recognized as much, having stated "on numerous

occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A.*, 559 U.S. at 682 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (other citations omitted)). In short, "[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 221.

Importantly, "[t]his duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *see also Gilmer*, 500 U.S. at 26 ("[S]tatutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA."). Any "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. The FAA's mandate is fully enforceable, then, "even when the claims at issue are federal statutory claims." *CompuCredit*, 132 S. Ct. at 669. An arbitration agreement, like any other contract, may be vitiated by a showing of "fraud or excessive economic power." *McMahon*, 482 U.S. at 226. But absent that, the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims

by skewing the otherwise hospitable inquiry into arbitrability." *Id.*

To be sure, "like any statutory directive, the [FAA]'s mandate may be overridden by a contrary congressional command." *McMahon*, 482 U.S. at 226. But this is an exacting standard. The "contrary congressional command" must be clearly expressed; another federal statute may not override the FAA unless the "qualification" is "found in its text." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009). Thus, if the other statute is "silent on whether claims ... can proceed in an arbitrable forum, the FAA requires [an] arbitration agreement to be enforced according to its terms." *Id.* at 273; *see also Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("[A]bsent a clear statement in a federal statute showing Congressional intent to override the use of arbitration, the FAA prevails.").

The rule that a federal statute will not be interpreted to forbid arbitration of claims within its ambit unless it does so *expressly* follows from ordinary principles of statutory construction. As explained above, the right the FAA protects is unambiguously outlined in the statutory text: the right to judicial enforcement of arbitration agreements as written. Courts are appropriately reluctant to read another federal statute to defeat that right. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535,

551 (1974); *see also Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989) ("We should read federal statutes 'to give effect to each if we can do so while preserving their sense and purpose.'") (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

A court's duty to reconcile two laws "to give effect to each," *Watt*, 451 U.S. at 267, is especially important when, as here, there is a claim that a more recent statute has superseded an older one. Repeals by implication are "strongly disfavored." *United States v. Fausto*, 484 U.S. 439, 452 (1988); *see also Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003). "A new statute will not be read as wholly or even partially amending a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (citations and quotations omitted); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945) ("clear repugnancy"); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("irreconcilable conflict") (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982)). Naturally, then, it is "strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453. Accordingly, for a new statute to supersede an existing one, "the intention of the legislature to repeal must be clear and manifest." *Town of Red Rock v. Henry*, 106 U.S. 596, 602 (1883). Another federal statute may not override that body of substantive law unless the "qualification" is "found in its text." *Penn Plaza*, 556 U.S. at 270.

II. The Court's Decisions Demonstrate that the Standard for a Congressional Override of the FAA is an Exacting One.

The "contrary congressional command" rule is straightforward. If Congress enacts a statute that expressly precludes or limits arbitration of certain federal claims, the new law prevails over the FAA.

Congress knows how to override the FAA, having done so on several occasions. In 2002, for example, Congress provided that "whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2).

More recently, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended several statutes to bar the enforcement of predispute arbitration agreements as to claims arising thereunder. *See, e.g.*, 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.") (Commodity Exchange Act); 12 U.S.C. § 5567(d)(2) (same) (Consumer Financial Protection Act); 18 U.S.C. § 1514A(e)(2) (same) (Sarbanes-Oxley Act). Also in 2010, Congress expressly conferred upon the Consumer Financial Protection Bureau ("CFPB") certain "[a]uthority to restrict mandatory pre-dispute arbitration." 12 U.S.C. § 5518 (section title); *see also* 12 U.S.C. § 5518(b) (authorizing the CFPB to

"impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers").

As these examples demonstrate, "Congress is fully equipped 'to identify any category of claims as to which agreements to arbitrate will be held unenforceable.'" *Penn Plaza*, 556 U.S. at 270 (quoting *Mitsubishi Motors*, 473 U.S. at 627). If Congress does not expressly override the FAA, however, then the federal statute cannot be construed to abrogate or amend the parties' arbitration agreement.

Importantly, the burden rests with the party opposing arbitration "to show that Congress intended to preclude a waiver of a judicial forum for [the federal] claims [at issue]." *Gilmer*, 500 U.S. at 26; *see also id.* ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."). And as Petitioner Ernst & Young emphasizes, "this Court's decisions demonstrate [that] the burden of proving that a federal statute displaces the Arbitration Act is a heavy one." E&Y Br. at 22.

Take, for example, *Mitsubishi Motors*. That case involved a purported conflict between the FAA and a provision of the Clayton Act, which states that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

of the United States ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act," the Court explained, "it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors*, 473 U.S. at 627. Because the Clayton Act evinced no such congressional intent, that was the end of the matter. As the Court explained, any "concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read." *Id.*

The Court's FAA decisions relating to the Age Discrimination in Employment Act ("ADEA") track the same path. Under the ADEA, "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1). The Supreme Court twice has held that this statutory text does not abrogate an employment agreement—whether bargained for collectively or individually—that requires individual arbitration of ADEA claims. *See Gilmer*, 500 U.S. at 26-27; *Penn Plaza*, 556 U.S. at 258-260.

In *Gilmer*, the Supreme Court emphasized that "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless

Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26. The Court concluded that the ADEA did not override the FAA because "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id.* at 26; *see also id.* at 29 ("[I]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.").

In *Penn Plaza*, the Supreme Court reaffirmed this construction of the ADEA and then took it one step further. After *Gilmer*, Congress had amended the ADEA to provide that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). On top of that, the legislative history included a statement that "any agreement to submit disputed issues to arbitration ... in the context of a collective bargaining agreement ... does not preclude the affected person from seeking relief under the enforcement provisions of Title VII." H.R. Rep. No. 102-40(1), at 97 (1991). The Court held that the amended ADEA still did not amount to a contrary congressional command. Even assuming that the amendment's legislative history expressed a congressional desire to curtail arbitration in the collective-bargaining setting, the Court refused to find a contrary congressional command to override the FAA in the absence of textual proof. *See Penn Plaza*, 556 U.S. at 259 n.6.

The Court's most recent decision in this area—*CompuCredit v. Greenwood*—is perhaps the best illustration of the high bar that a party challenging an arbitration agreement must meet to prove that Congress intended to override the FAA. In *CompuCredit*, credit-card holders who sued their card providers under the Credit Repair Organizations Act (CROA) argued that the CROA overrode the FAA and precluded enforcement of their otherwise-binding arbitration agreements. The cardholders argued that the CROA's provision requiring disclosure of the cardholder's right to sue together with a substantive non-waiver provision created a non-waivable right to bring class claims in a judicial forum. *See CompuCredit*, 132 S. Ct. at 670. But the Court rejected this argument, explaining that even this express language could not "do the heavy lifting" needed to override the FAA and confer not only a substantive right to a cause of action, but also a non-waivable right to a judicial forum. *Id.* "It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit," the Court further explained. *Id.* "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id.* (citation omitted). Put simply, "[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far

exceeds the claimed indications in the CROA." *Id.* at 672.

Justice Sotomayor's separate concurring opinion in *CompuCredit* (joined by Justice Kagan) further highlights the exacting standard for demonstrating a congressional override. In their view, the override question was a close one; the concurrence characterized the cardholder's position as "plausible." *Id.* at 675. But, of course, plausibility is not sufficient. Nor was it enough that Justice Sotomayor concluded that "the parties' arguments [were] in equipoise." The standard for an override "require[s] that petitioners prevail in this circumstance." *Id.*

* * *

As the Court's precedents make clear, the standard for a congressional override of the FAA is an exacting one. For the reasons outlined by Petitioners in Nos. 285 and 300 and Respondents in No. 307, the NLRA does not come close to meeting this standard. *See* E&Y Br. at 32 ("Neither the text, legislative history, nor the underlying purposes of the NLRA reveal anything even approaching a clear congressional command precluding agreements to arbitrate generally or agreements to arbitrate on an individual basis specifically.").

Simply put, there is no "qualification ... found in [the] text" of the NLRA capable of overriding the FAA. *Penn Plaza*, 556 U.S. at 270.

CONCLUSION

The judgments of the Fifth Circuit in *Murphy Oil* should be affirmed, and the judgments of the Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Ernst & Young* should be reversed.

Respectfully submitted,

/s/ Thomas R. McCarthy

Thomas R. McCarthy
J. Michael Connolly
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL SUPREME COURT CLINIC
3033 Wilson Blvd.,
Suite 700
Arlington, VA 22201
(703) 243-9423

Counsel for Amici Curiae

June 16, 2017

Nos. 16-285, 16-300 & 16-307

FILED
AUG 16 2017

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

ERNST & YOUNG LLP, et al.,

Petitioners,

v.

STEPHEN MORRIS, et al.,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

MURPHY OIL USA, INC., et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF THE MAIN STREET ALLIANCE, THE AMERICAN SUSTAINABLE BUSINESS COUNCIL, AND NICK HANAUER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NOS. 16-285 & 16-300, AND OF PETITIONER IN NO. 16-307

SAMUEL R. BAGENSTOS
Counsel of Record
KATE ANDRIAS
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com
Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE**

The Main Street Alliance ("MSA") is a national nonprofit organization dedicated to raising small business owners' voices on issues that affect their businesses, their employees, and the communities they serve. Founded in 2008, MSA has become a national network, representing 30,000 small business owners across the United States, with chapters and affiliates in 13 states. MSA represents a diverse group of small business owners in industries ranging from storefront service, retail and restaurants, to light manufacturing and food processing. The MSA supports employees' collective action rights because concerted advocacy benefits small businesses and the national economy.

The American Sustainable Business Council ("ASBC") is a national organization with state affiliates that advocates for economic, social, and environmental market and policy changes to build a more sustainable nation and world. Through its national member network, ASBC represents more than 250,000 U.S. businesses and more than 325,000 entrepreneurs, executives, managers and investors. ASBC supports employees' collective action rights because concerted activity is an important tool for building a fair, fulfilling, and prosperous economy for all.

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* Pursuant to S.Ct. R. 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this matter.

Nick Hanauer is a business leader, entrepreneur, venture capitalist, and author. He founded aQuantive, was the first non-family investor in Amazon.com, has successfully created many other businesses, and is the best-selling author of two books: The True Patriot and Gardens of Democracy. Based on his business experience, he believes that structures that favor large firms over small ones and that disempower workers – like collective action waivers – hurt our economy and are a key cause of America's growing inequality.

SUMMARY OF ARGUMENT

Responsible employers, particularly small employers, comply with employment laws to decrease employee turnover and to ensure worker productivity. These firms also rely on widespread compliance with employment laws to sustain consumer spending. Yet collective action waivers decrease incentives for competitors to comply with employment laws. When such waivers are permitted, responsible businesses are forced to compete on a tilted playing field; lawbreakers are advantaged; and the viability of small firms in particular is threatened. *See* pp. 3-20, *infra*.

Moreover, contrary to the claims of challengers, class arbitration is efficient, informal, and expeditious – for employers as well as employees. Its availability saves resources by avoiding multiple, duplicative adjudications and by fostering the development of innovative procedures. In addition, class procedures minimize

workplace disruption. Under the Board's rule, employees can take advantage of class procedures that reduce acrimony, but they also remain free to choose individual adjudication of their claims. *See* pp. 20-29, *infra*.

ARGUMENT

I. COLLECTIVE ACTION WAIVERS DISADVANTAGE RESPONSIBLE BUSINESSES, PARTICULARLY SMALL BUSINESSES, BY PROTECTING CORPORATE WRONGDOING.

Responsible employers, and particularly small employers, rely on worker protections as an integral component of their business models. Compliance with employment laws helps meet the unique needs of these businesses by increasing productivity and reducing long-term costs, and it helps ensure that customers receive sufficient wages to make purchases at local and law-abiding businesses. Collective action waivers endanger these firms because those waivers decrease incentives for other businesses to comply with employment laws. If employers are free to require their employees to waive their collective action rights, law-abiding businesses will be forced to compete on a tilted playing field. The result will be to advantage lawbreakers and threaten the viability of small firms in particular, and socially responsible firms more generally.

A. Responsible businesses comply with employment laws to reduce long-term costs and to increase productivity.

Many businesses comply with employment laws because compliance creates long-term benefits for their firms. Abiding by worker protections like the minimum wage, prohibitions on sex discrimination, and health and safety requirements reduces employee turnover and increases worker productivity. Small businesses in particular rely on these economic benefits to succeed in the market.

Responsible businesses provide workplace protections to retain their employees and to reduce the expenses associated with recruiting and training new workers. Turnover costs typically amount to about 20 percent of an employee's annual salary. *See* Heather Boushey & Sarah Jane Glynn, Center for American Progress, There Are Significant Costs to Replacing Employees 1-2 (Nov. 16, 2012), https://perma.cc/mxd2-gb32 (analyzing 30 case studies regarding costs of employee turnover).

Reducing turnover is particularly important for smaller employers. For businesses supervised by a few managers, hiring a new employee consumes valuable time and resources – a burden that larger competitors can avoid through economies of scale. Melissa S. Cardon & Christopher E. Stevens, *Managing Human Resources in Small Organizations*, 14 Human Resource Mgmt. Rev. 295, 297-99, 308-11 (2004). Large corporations utilize extensive human resources departments

to quickly find and train new workers. *Id. See also* Herman G. Heneman & Robyn A. Berkley, *Applicant Attraction Practices and Outcomes Among Small Businesses*, 37 J. Small Bus. Mgmt. 53, 66 (1999). In contrast, "in small firms, where resources are likely to be scarce, there may be a very small number of formal HR departments or professionals, increased difficulty in recruiting and retaining employees due to lack of financial resources, and an increased reluctance to engage in costly or restrictive practices." Cardon & Stevens, *supra*, at 297. Because of the disproportionate burden that they face in recruiting and training new employees, it is not surprising that a national survey of small business owners in 2013 reported that 60 percent of respondents stated that their "biggest challenge in hiring or managing staff is finding skilled professionals for the job." *Small Businesses, Big Recruiting Challenges*, Robert Half (Aug. 6, 2013), http://rh-us.mediaroom.com/index.php?s=487&item=1734.

Amici and their members rely on workplace protections to avoid the expenses associated with employee turnover. Jennifer and John Kimmich own the Alchemist Brewery in Vermont. They told MSA that their "employee turnover is relatively non-existent and our hiring and training line in the budget is $0," in large part because "our employees can count on a full paycheck each and every week of the year." *Shop Your Values*, Main Street Alliance, http://www.mainstreetalliance.org/shopyourvalues. Similarly, Rhonda Early, who owns a café in Oregon, successfully decreased employee turnover by providing access to earned paid sick

days. *Id.* By complying with workplace laws and providing valuable employee benefits, responsible small businesses increase their retention rates and avoid the disruptive costs of finding new employees.

Responsible businesses additionally rely on workplace protections to increase the productivity of their incumbent employees. Here, too, the benefit is particularly important for employers with modestly sized workforces. Researchers have found that "[t]he dependence of small employers on their workers is heightened by the fact that they typically employ [few employees]. Consequently, the poor performance – or absence – of one [worker] can have a disproportionately high impact on productivity." Richard Scase & Robert Goffee, *The Entrepreneurial Middle Class* 112 (2015).

Moreover, small businesses must maintain consistent productivity because they are more vulnerable to market disruptions. Large corporations are more able to endure those disruptions, because they "have advantages in raising capital, face better tax conditions and government regulations, and are in a better position to compete for qualified labor." Josef Bruderl and Rudolf Schussler, *Organizational Mortality: The Liabilities of Newness and Adolescence*, 35 Admin. Sci. Q. 530, 535 (1990). In contrast, small firms "are likely to bear the brunt of an economic downturn," and they respond to poor market conditions by "reduc[ing] their economic activity earlier and more sharply than do

others in the economy." Ben Bernanke et al., Nat'l Bureau of Econ. Research, *The Financial Accelerator and the Flight to Quality* 2 (1994).

Because of the importance of maintaining productivity, MSA and ASBC members, as well as other responsible employers, prioritize workplace protections and benefits. After New York State passed a paid family leave program, MSA member Brian Barnett stated that "[t]he most important thing I can do to help my bottom line is to take care of my employees; to be sure they are able to focus on providing my customers with the best possible service." Stephen Rouzer, *Small Business Owners Say Paid Family Leave Gives Them a Competitive Advantage – Without Hurting Bottom Line,* Main Street Alliance (Apr. 1, 2016), http://www.mainstreetalliance.org/new_york_business_owners_rally_for_paid_family_leave. MSA members across the country support paid sick time in order to increase their productivity. When President Obama announced that federal contractors would have access to paid sick time, MSA member Shannon Forney stated that she supported the measure because "[t]he advantages we gain in areas of employee acquisition, retention, and productivity will help us do our jobs better, and will make St. Paul, and our country a better place to do business." Stephen Rouzer, *DOL Issues Final Rule on President Obama's Executive Order Granting Paid Sick Days to Federal Contractors*, Main Street Alliance (Sept. 29, 2016), http://www.mainstreetalliance.org/dol_issues_final_rules_on_executive_order_paid_sick_days. Similarly, Sabrina Parsons explained that providing

the workers at her software company with workplace protections is "returned in full [with] hard work and dedication. We owe the growth of our company to the commitment of our employees, one we have fostered with our strong commitment to them." *Shop Your Values*, *supra*.

Social science research confirms that workplace protections increase productivity. The Occupational Safety and Health Administration has found that "businesses that implement injury and illness prevention programs . . . reduce injuries by 15 to 35 percent," which leads to $23 billion in worker compensation savings. U.S. Occupational Safety and Health Administration, *Injury and Illness Prevent Programs, White Paper* 7-8 (2012). Moreover, consistent research shows that state and local laws expanding access to paid sick leave improve business conditions. A study analyzing the effect of a paid sick leave law in Jersey City, New Jersey found that workplaces forced to change their benefits after the law's passage realized widespread advantages, including fewer sick employees coming to work, lower turnover, higher quality job applicants, and increased productivity. U.S. Dep't of Labor, *Get the Facts on Paid Sick Time* 5 (2015). Similarly, a study analyzing a paid sick leave law in Connecticut reported that over a quarter of employers found that their workers experienced "improved morale, and substantial numbers reported increases in employee motivation and loyalty." Eileen Applebaum et al., *Good For Business? Connecticut's Paid Sick Leave Law* 15 (2014). For small businesses that rely on productivity from few

employees, the gains realized from health and safety laws create important benefits.

Employment laws protecting the minimum wage and prohibiting sex discrimination improve productivity as well. Decades of research shows that the minimum wage maintains productivity because "workers proportionately withdraw effort as their actual wage falls short of their fair wage." George K. Akerlof & Janet L. Yellen, *The Fair Wage-Effort Hypothesis and Unemployment*, 105 Q. J. Econ. 255, 255 (1990). *See also*, Council of Economic Advisers, *The Economic Case for Raising the Minimum Wage* 9 (Feb. 12, 2014). Similarly, consistent research shows that workplaces that contain sexual harassment or discrimination experience lower productivity due to increased use of sick days, higher turnover, and lower employee morale. Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace* 17-25 (June 2016). Losses in productivity due to sex discrimination can create significant monetary burdens. For example, one study by the U.S. Merit Systems Protection Board found that sexual harassment between 1992 and 1994 cost the federal government $327 million. U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workforce 23-26 (1995). By complying with employment laws, *Amici* and their members create long-term benefits for their businesses that are integral to their economic success.

B. Small and responsible businesses rely on widespread compliance with employment laws to sustain consumer spending.

In addition to the benefits that individual firms realize when adhering to employment laws, general compliance with those laws creates macroeconomic benefits that are especially important to small businesses in particular, and socially responsible firms in general. If employers fail to compensate workers with adequate wages or fail to provide employees with essential benefits, workers have less money to spend in their communities – a result that will hit small and socially responsible firms especially hard.

Small businesses are more vulnerable than larger ones to reductions in consumer spending. When consumer spending declines, financial institutions are more likely to provide credit to large firms than to small ones, and large companies can lower their costs by exploiting tax loopholes and shifting profits overseas. *See* Bernanke, *supra*, at 2; Frank Clemente et al., *Corporate Tax Chartbook* 1-3 (2016); Janean Chun, *Small Businesses Pay the Price for Big Corporations: Study*, CNBC, Apr. 13, 2012 ("Responsible small businesses are further hurt by corporate tax dodging because they are put at a competitive disadvantage since they can't hire armies of well-paid lawyers and accountants to use offshore tax loopholes."). In contrast, reductions in consumer spending often lead to widespread small business failures. Because small firms have limited access to credit, they generally rely on their internal resources to finance their expenses.

Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending* 15-17 (2014). During periods of low consumer spending, those resources quickly deplete. *Id.* The recent recession highlighted that vulnerability. Between 2007 and 2012, small businesses accounted for 60 percent of national job losses, and job losses were "even more significant among the smallest of small businesses." *Id.* at 3.

Because they are disproportionately sensitive to changes in consumer spending, small firms depend on widespread compliance with minimum wage laws to ensure that members of their community earn sufficient wages to allow for disposable income. When employers compensate their workers with dependable wages, their increased pay creates a multiplier effect that leads to greater consumer spending. Doug Hall & David Cooper, *How Raising the Federal Minimum Wage Would Help Working Families and Give the Economy a Boost* 8-11 (2012). Because higher wages increase demand, a survey in 2015 by Public Policy Polling showed that 60 percent of small businesses support gradually raising the minimum wage to $12 per hour by 2020. Small Business Majority, *Small Businesses Support Raising the Minimum Wage to $12* 1 (2015).

Amici and their members have learned from experience that when employers comply with their legal obligations their workers will increase spending at local firms. Catherine and Cheryl Reinhart, who own a bakery in Oregon, explained that "[i]t's simple economics: we sell more sweets when working families have more

money in their pockets to take their kids out for a treat." *Shop Your Values*, *supra*. Another Oregon small business owner, Deborah Field, reported that, "[m]y business, as with any small business, grows when customers have the money to spend at my shop. When patrons in my community are able to buy high-end paper goods and custom design services, my business thrives." *Id.* And one owner of a cafe told MSA that, "[b]y raising the minimum wage, we increase the amount of funds injected into the local economy. This allows others to spend more money in their local shops; shops like mine." *Id.*

Laws prohibiting wage theft are also critical to ensuring that individuals can afford to shop locally. Wage theft has become a pervasive problem in the United States. According to a 2009 study of more than 4,000 workers in low-wage industries in Chicago, Los Angeles, and New York, 26 percent of workers reported receiving less than the minimum wage in the prior week, and 76 percent reported that they did not receive compensation for overtime work. Annette Bernhardt et al., *Broken Laws, Unprotected Workers* 2 (2009). Across the United States, in fiscal year 2016, the Department of Labor's Wage and Hour Division recovered more than $266 million in back wages on behalf of 283,677 employees. U.S. Dep't of Labor, *Fiscal Year Data for WHD, WHD All Acts*, https://www.dol.gov/whd/statistics/statstables.htm. Moreover, employees are often unable to recover the full amount of their lost wages. Although wage theft in the United States leads to approximately $50 billion in lost wages annually, workers recover less

than 2 percent of those losses in legal proceedings. Brady Meixell & Ross Eisenbrey, Econ. Policy Inst., *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year* 2 (2014). That unremedied harm inevitably prevents workers from spending at local small businesses.

In addition to wage and hour laws, laws prohibiting sex discrimination help ensure local spending because families increasingly rely on wages earned by working mothers. Nearly 40 percent of married women are their family's primary wage earner, and women contribute nearly 40 percent to the earnings of median households with a woman working outside the home. Joint Economic Committee Democratic Staff, *Gender Pay Inequality* 9-10 (2016). Because of the importance of wages earned by women, policies ensuring pay equity augment families' purchasing power. One 2014 study showed that eliminating the gender pay gap would have produced $447.6 billion in additional income for families in 2012. Heidi Hartman et al., *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy* 1 (2014). Anti-discrimination laws also strengthen women's participation in the labor force, which further aids the broader economy. An OECD study found that increasing women's participation in the labor force by 50 percent would increase GDP growth by 2.9 percent. Organization for Economic Co-operation and Development, *Closing the Gender Gap: Act Now*, Table I.A3.1 (Dec. 17, 2012). MSA members want to ensure enforcement of pay equity laws because those laws help support their businesses. One member in Maryland

stated: "80% of my customers are women. When women aren't paid equally for equal work my business is put at a competitive disadvantage. Closing the wage gap is good for my business and my community."

C. Collective action waivers force responsible businesses to compete on a tilted playing field and threaten the viability of smaller firms.

Collective action proceedings encourage employers to abide by workplace protections. Allowing employers to force their workers to waive access to those proceedings would unfairly benefit corporate wrongdoers, disadvantage responsible firms, and threaten the viability of law-abiding businesses.

Collective action is an essential tool for achieving compliance with workplace law. First, in many cases the lack of a collective action device will mean that unlawful conduct goes entirely unchallenged. Many systemic violations of the employment laws – such as those involving disparate pay or discrimination in promotions – cause only small amounts of monetary harm to each individual victim. That is true even if the aggregate harm to all of an employer's workers is quite large. In those cases, "there is no feasible way to hold [the] defendants accountable or provide any compensation to people who actually might be worthy claimants." Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 294 (2014). For individual claimants with small claims – even if there could be no

reasonable doubt as to their merit – the result would be, not "a multitude of individual suits," but no suits at all. *See id.* at 294-95.

Moreover, the size of collective proceedings creates a deterrent that individual claimants simply cannot achieve. A single collective action can include thousands of employees. For example, one recent study described "a race and gender discrimination claim brought by 15,000 employees against Boeing, a wage and hour claim brought by over 5,000 employees against IBP Inc., a working conditions suit brought by over 30,000 workers against The Gap, and a race discrimination claim brought by over 2,000 African-American employees against Coca-Cola." Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309, 1346 (2015) (footnotes omitted).

Collective action proceedings also make it easier for employees to gather evidence to demonstrate pervasive wrongdoing. By relying on the experiences of multiple workers and by facilitating thorough discovery, collective action brings to light misdeeds that would otherwise remain hidden. *See, e.g.*, *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 115-16 (2d Cir. 2011).

And employees pursuing collective action can more easily encourage employers to institute changes to their overall workplace policies and procedures that will ensure compliance with the law. Although claimants acting alone may succeed in obtaining personal

relief, individual claimants often cannot force their employers to alter their general policies. Sternlight, *supra*, at 1350. In contrast, collective action proceedings may produce a settlement or final judgment that requires an employer to change basic workplace practices, such as policies concerning hiring, training, promotion, or compensation. To determine whether to grant injunctive relief, courts ask "whether the employer's discriminatory conduct could possibly persist in the future," *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 864 (7th Cir. 2001), and multiple plaintiffs with shared experiences will have an easier time demonstrating that the employer's conduct will likely continue. For example, in 2014, some of the most significant class actions required employers to "abstain from inquiring into genetic information, make available American Sign Language interpreters for important workplace communications, adopt new interview policies, and develop and apply a new pension determination formula for all employees." Sternlight, *supra*, at 1350 n.253 (citation omitted).

When employers require their workers to waive their rights to collective action, employers enable themselves to engage in wrongdoing. As a result, law-abiding businesses find themselves at a competitive disadvantage. Every year, responsible firms lose billions of dollars to corporations that violate workplace laws. Evidence from federal contracts provides a snapshot of the significant business diverted annually to corporate wrongdoers. A report by the Senate Health, Education, Labor and Pensions Committee found that,

of the $518 billion in federal contracts awarded in fiscal year 2012, the federal government awarded $81 billion to companies that were responsible for "large violations of federal labor laws." Sen. Comm. on Health, Education, Labor and Pensions, Maj. Comm. Staff Rep., *Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* 1 (2013). Between 2007 and 2012, these corporations committed 1,776 separate violations of federal workplace laws, paid $196 million in fines and penalties, and were responsible for 42 workplace deaths. *Id.*; *The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat, Joint Hearing Before the Subcomm. on Workforce Protections and the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and the Workforce*, 114th Cong. 61 (2015) (statement of Karla Walter, Assoc. Dir., Cent. Am. Progress); *see also* U.S. Gov't Accountability Off., GAO-10-1033, Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors 1 (2010). Particularly given the inherent vulnerabilities that small firms face, the federal government should not "bend the marketplace" to promote corporate wrongdoers. *See* Stacy Mitchell, *Testimony to Congress: Overhaul Federal Policy to Support Strong Local Economies*, Institute for Local Self Reliance (Apr. 16, 2015), https://ilsr.org/testimony-congress-overhaul-federal-policy/#_ftnref.

In addition to losing contracts to corporate wrongdoers, responsible businesses must subsidize employers that flout their corporate responsibilities. According to

the DOL, in 2010, "minimum wage violations in California reduced payroll taxes by $167 million," and minimum wage violations in California and New York alone "resulted in an estimated $113 million in lost federal income taxes." U.S. Dep't of Labor, *The Social and Economic Effects of Wage Violations: Estimates for California and New York by Eastern Research Group Inc.* 4 (2014). Similarly, the Internal Revenue Service concluded that corporations underreported and underpaid $41 billion in corporate income tax between 2008 and 2010. U.S. Internal Revenue Service, *Tax Gap Estimates for Tax Years 2008-2010*, at 4 (Apr. 2016). When corporations fail to satisfy their legal responsibilities, law-abiding firms must pay more. As the Illinois Department of Labor explains, corporate non-compliance with employment laws requires that responsible businesses pay "higher unemployment insurance contributions, higher workers' compensation premiums, and higher taxes." Illinois Department of Labor, *Employer Miscalculation of Workers*, https://www.illinois.gov/idol/Employees/Pages/Employer-Misclassification-of-Workers.aspx.

The problem is not simply one of fairness. By giving law-breaking firms a competitive advantage, collective action waivers encourage previously responsible employers to skirt the law themselves. Employers who violate labor protections may in the short term lower their costs, and thus the prices they charge their customers, thereby undercutting their competitors. To remain afloat, even those employers who want to comply with the law – and believe it is in their long-term

interest to do so – face pressure to sink to the level of less responsible businesses. MSA's members have experienced this dynamic firsthand. Sierra Dietz owns a gift store chain in Maine; she stated, "I care about my employees and I wish I could pay them more, but I have to compete with big box stores that pay poverty wages." *Shop Your Values*, *supra*. Similarly, Gloria Vargas, who owns a restaurant in Oregon, said, "I want to pay good wages and provide basic benefits like paid sick days, but in order for me to do that, my competitors, like the big chain restaurants, need to also." *Shop Your Values*, *supra*. *Amici* and their members want to maintain positive workplace environments in order to motivate their workers and to reduce long-term costs, but competition from corporate wrongdoers undercuts the benefits and protections that they can provide to their workers.

But the harms are more significant even than the systemic undermining of legal obligations. As we have shown, *see* pp. 4-7, *supra*, many small businesses cannot survive a race to the bottom. To flourish, they must attract and retain a productive labor force; doing so requires careful compliance with employment laws. If short-term competitive pressures force these firms to give up their high-road stance, many will simply not be viable.

This case thus presents an issue of great importance to *Amici*, their members, and other responsible businesses. Those firms rely on worker protections as part of their commitment to remain law-abiding,

profitable firms. If the Court permits employers to require their workers to waive their right to collective action, that decision will gravely affect responsible businesses overall, and small businesses in particular.

II. ALLOWING EMPLOYEES TO EXERCISE THEIR STATUTORILY PROTECTED COLLECTIVE ACTION RIGHTS WILL NOT SACRIFICE THE INFORMALITY, COST SAVINGS, OR EXPEDITION OF TRADITIONAL ARBITRATION.

The employers in these consolidated cases contend that collective adjudication of employees' claims necessarily destroys the informality, cost savings, and speed traditionally attributed to arbitration. They further argue that class procedures are incompatible with the arbitral form. They are wrong. Class arbitration is efficient, informal, and expeditious, with a history going back a century. *See, e.g.*, Imre S. Szalai, *Aggregate Dispute Resolution: Class & Labor Arbitration*, 13 Harv. Negot. L. Rev. 399 (2008) (tracing the development of representative relief in arbitration from the National War Labor Board during World War I through present day class arbitration). Employees, employers, and society save resources by avoiding multiple, duplicative adjudications and by fostering the development of innovative procedures. Finally, class procedures minimize workplace disruption and protect employee choice. Under the Board's rule, employees can take advantage of class procedures that reduce acrimony and

foster anonymity, but they also remain free to choose individual adjudication of their claims.

A. Class arbitration is informal and flexible.

Class arbitration is informal and flexible. Subject to limited constraints, the parties may contract for procedures that are suited both to their needs and to the particular claims presented to the tribunal. *See, e.g.*, Thomas E. Carbonneau, The Law & Practice of Arbitration 6-14 (4th ed. 2012); S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?*, 17 Harv. Negot. L. Rev. 201, 255-57 (2012). Where the parties cannot agree on specific rules, the arbitrator may fashion rules suited to the parties, dispute, and substantive law at issue. *See* W. Mark Weidemaier, *Arbitration and the Individuation Critique*, 49 Ariz. L. Rev. 69, 97 n.159 (2007).

The challengers to the NLRB's rule contend that reduced formalities in individualized arbitration increase access to justice and encourage employees to bring claims. To the contrary, empirical studies suggest that such informalities actually decrease access to justice in the vast majority of cases. Few employees subject to arbitration agreements bring small – or indeed, any – claims. When they do bring claims, regardless of size, they achieve systematically worse results against employers. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 462 (2016). For example, individual employees who avail themselves of

telephonic hearings – which are often touted as a uniquely informal device that facilitates access to arbitration – have win rates that are significantly lower than those who do not take advantage of the informal procedure. *Id.* at 492. And although such informal procedures ostensibly allow employees to present claims without the assistance of lawyers, unrepresented employees prevail just 7% of the time. When represented, their success rate nearly triples: Employees represented by lawyers prevail between 19% and 28% of the time. *Id.* at 484; *see also* Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors & Outcomes*, 68 Indus. & Lab. Rel. Rev. 1019, 1037 (2015) (observing that self-represented employees have lower success rates, lower damages awards, and greater susceptibility to repeat player effects).

Class arbitration eliminates such systemic disadvantages while preserving procedural flexibility. An employee who chooses to bring a class arbitration obtains access to the "equipage that a group can provide," most notably in the form of counsel. *See* Judith Resnik, *Fairness in Numbers*, 125 Harv. L. Rev. 78, 135 (2011). The key flexibilities of bilateral arbitration remain available: the Rules of Evidence need not apply; there is no universal requirement of extensive and intrusive discovery; the parties and their counsel remain free to appear telephonically; and the arbitrator retains the discretion to "conduct the proceedings with a view toward expediting the resolution of the dispute," so long as he does not alter the burdens of proof or production,

see Employment Arbitration Rules, R. 28 (Am. Arbitration Ass'n 2009). Such a "flexible approach to adjudication is less destructive of business relationships and allows the parties to continue to do business once the dispute has been resolved." Carbonneau, *supra*, at 4.

Flexibility characterizes even the class procedures themselves. Class certification and other class procedures, even in arbitration, must necessarily observe some formalities to protect and to bind absent class members. But these procedures are more adaptable in arbitration than in litigation. For example, class arbitration may utilize an opt out procedure, as in Federal Rule of Civil Procedure 23 and the AAA class rules, *see* Supplementary Rules for Class Arbitrations R. 6 (Am. Arbitration Ass'n 2003); or it may utilize an opt in procedure, similar to that available under the Fair Labor Standards Act, 29 U.S.C. § 216(b) (2016), and found in the JAMS rules, *see* Class Action Procedures R. 3 (JAMS 2009); or, in smaller cases, an arbitrator may use simple joinder, which is available in many different systems. Because of such flexibility, class arbitration allows for procedures tailored to the claims and the claimants. The result is to allow expeditious processing of claims while providing fair process.

Finally, class arbitration allows for innovation and development of new and efficient procedures. "There is a flexibility that is possible in connection with private class arbitration that may not be possible in connection with traditional class actions[.]" Szalai, *supra*, at 477 (2008); *see also id.* at 474-79 (identifying potential avenues for development, including the use of electronic

resolution systems and a multiple step process incorporating other methods of dispute resolution prior to class certification).

B. Class arbitration is efficient and conserves the resources of employers, employees, and society.

Not only does class arbitration preserve flexibility; it also serves the goal of efficiency. Accepted rules governing class arbitration permit such proceedings only if they would be more efficient than individualized arbitration. *See, e.g.*, Supplementary Rules for Class Arbitrations R. 4 (Am. Arbitration Ass'n 2003); Class Action Procedures R. 3 (JAMS 2009) (requiring arbitrators to follow Fed. R. Civ. P. 23(a) and (b)); Fed. R. Civ. P. 23; *see also* Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. on Arb. & Mediation 220, 229 (2014) (observing the relationship between class arbitration and Rule 23 and suggesting class arbitration may be "extra-efficient").

"[C]lass arbitration increases the efficiency and reduces the costs of the proceeding, as companies can avoid having to arbitrate numerous single disputes and claimants are offered the opportunity to bring a claim when the individual amounts do not justify initiating an individual proceeding." Francisco Blavi & Gonzalo Vial, *Class Actions in International Commercial Arbitration*, 39 Fordham Int'l L.J. 791, 826-27 (2014). Although the total costs of class arbitration

are higher than those in a single individual arbitration, they are almost certainly lower than the costs employers and employees incur by filing, pursuing, and defending numerous individual claims. As one practitioner has observed:

> [t]here is little doubt that filing dozens, hundreds, or thousands of individual arbitrations against the same company would be less efficient than a single class action. Indeed, most arbitral institutions may not even have the resources to handle such an endeavor, particularly if the underlying contract * * * does not allow any kind of aggregation, but rather requires separate written submissions, separate adjudicators, separate testimony, and separate hearings.

Raviv, *supra*, at 230; *see also* Miller, *supra*, at 326-27 ("A lack of effective collective dispute resolution formats will disadvantage all those who participate in the judicial (or arbitration) process.").

When allocated across the class, the per-claimant cost to file is significantly less than would be the case in individual arbitration. Such thrift enables individuals with smaller claims to pursue a remedy. *See id.* at 294-295; *see also* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power & Federal Preemption*, 82 Denv. U. L. Rev. 301, 349 (2004) (observing that a pure arbitral model of classwide arbitration corrects an imbalance of power between the parties by allowing plaintiffs "to join

collectively to seek redress[, which] is especially significant where the claims involve small dollar amounts, rendering it uneconomical for consumers or employees to pursue individual arbitrations").

In addition, class arbitration enables employees in the class to continue in their employment free from fear of retaliation. Just as the named claimant receives the support, resources, and counsel necessary to present the claims, she provides unnamed class claimants with anonymity and the prospect of representative relief. *See* Note, *Subverting Workers' Rights*, 67 Hastings L.J. 881, 888–892 (2016); Resnik, *Fairness in Numbers*, *supra*, at 135. Such representative relief, combined with the protection of anonymity, allows the vast majority of the claims in a class to be resolved in a way that is even less adversarial than bilateral arbitration, for there is no direct confrontation between employer and employee before a tribunal. *Cf.* Carbonneau, Practice of Arbitration, *supra*, at 2-3.

Invocation of the class procedure is more cost-effective not only for employees, but also for employers. Class arbitration procedures allow employers to avoid duplicative litigation and inconsistent results, enabling them to structure their affairs with certainty by relying on the uniform resolution of common or recurring questions of law or fact. *See* Carbonneau, *supra*, at 62-63; *cf.* Miller, *Aggregate Litigation*, *supra*, at 313 (suggesting that aggregation of claims may produce a binding effect for all potential claimants, prevent systemic inefficiencies, avoid inconsistent outcomes, and, crucially for defendants, promote "global peace").

The challengers' arguments regarding the time-consuming nature of class proceedings are similarly without merit. The flexibility of class arbitration ensures speedy adjudication of claims. Indeed, where claims are particularly time-sensitive, parties may agree to expedited or "fast-track" arbitration, which limits the length of arbitral proceedings and requires the arbitrators to render an award within a specific time. If implemented selectively, such a technique could result in even more expeditious class arbitrations. *See* Carbonneau, Practice of Arbitration, *supra*, at 70-71.

C. Class arbitration preserves choice and promotes workplace welfare.

Crucially, employees remain free to pursue their claims in individual arbitration, either by filing for bilateral arbitration in the first instance or by opting out of a proposed class. In this way, employees with small, widely shared claims obtain access to a cost-effective means of redress, while those with individualized claims or damages that are not amenable to class treatment (or, indeed, those who choose not to participate in class proceedings for any reason at all) remain free to proceed individually or not to pursue their claims at all. *See* Strong, *supra*, at 234 ("Regardless of the reason for declining to join the class, choosing not to participate preserves both the individual party's substantive legal claim and the right to name an arbitrator in any future legal dispute.").

In the employment context, the availability of the class mechanism is particularly important because it is less disruptive of the workplace and allows employees to calibrate their level of involvement in the proceedings. Minimizing disruptions is particularly important for small businesses, because they are acutely affected by turnover costs. *See* pp. 4-6, *supra*.

For all of these reasons, collective action waivers impede efficiency and access to justice. To the extent that these waivers produce gains for *anyone*, that is only because the benefits of mandatory individual adjudication flow disproportionately to large, law-evading actors, allowing them to escape liability at the expense of employees and law-abiding small businesses.

CONCLUSION

The judgments in Nos. 16-285 and 16-300 should be affirmed, and the judgment in No. 16-307 should be reversed.

Respectfully submitted,

SAMUEL R. BAGENSTOS
Counsel of Record
KATE ANDRIAS
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com
Counsel for Amici Curiae

RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300, and 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner,*

v.

JACOB LEWIS, *Respondent.*

ERNST & YOUNG, LLP, et al., *Petitioners,*

v.

STEPHEN MORRIS, et al., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

MURPHY OIL USA, INC., et al., *Respondents.*

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICI CURIAE* MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA SUPPORTING RESPONDENTS IN NOS. 16-285 AND 16-300 AND PETITIONER IN NO. 16-307

BRIAN E. FROSH
Attorney General of Maryland

STEVEN M. SULLIVAN
Solicitor General

PATRICK B. HUGHES
Assistant Attorney General
Counsel of Record

200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6325
phughes@oag.state.md.us

[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

Did the Seventh and Ninth Circuits correctly conclude that the Federal Arbitration Act does not require enforcement of arbitration agreement terms that are illegal under the National Labor Relations Act and unenforceable under the Norris-LaGuardia Act?

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W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. Pub. L. 411 (2003) 27

INTEREST OF *AMICI CURIAE*

The Amici States have three important interests in these consolidated cases. First, our residents have long held a "fundamental right" under the National Labor Relations Act ("NLRA") to engage "'in concerted activities'" for their "'mutual aid or protection.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (quoting 29 U.S.C. § 157). Many of the Amici States have enshrined the same right in our own labor statutes and have enacted laws providing that our courts shall not enforce contracts requiring an individual employee to waive that right. *See infra* at 11-14. We have a responsibility to safeguard the rights provided by these statutes.

Second, the Amici States have a duty to protect our residents from violations of state and federal employment laws. Because we do not have the resources to enforce every violation of these laws, we rely on individual employees to help. In turn, these employees often depend on their ability to join together to assert their rights. Experience shows that without that ability to join together, many fewer employees will pursue claims, thus placing additional burdens on already over-burdened state regulators and leading to the under-enforcement of state and federal workplace protections.

Third, the Amici States have an interest in any case involving the interpretation of a statute, such as

the Federal Arbitration Act, that has been found to preempt state laws.

SUMMARY OF ARGUMENT

1. The states and the federal government have long recognized that employees need the right to join together in concerted activities and should not be forced to sign away that right just to earn a living. During the early years of the 20th Century, many employers included terms in their contracts that – like the arbitration agreements at issue here – required individual employees to waive the ability to join together as a condition of employment. In response to these "yellow dog" contracts, Congress and many states enacted legislation rendering unenforceable all contract terms that required individual employees to waive their ability to engage in concerted activities.

Congress and many states then went further, enacting the NLRA and analogous state laws to grant employees substantive "right[s]" to engage in "concerted activities" for their "mutual aid or protection," and to make it illegal for employers to interfere with those rights. Together, these statutes ensure that employees have true liberty of contract, may meaningfully assert their rights against their employers, and cannot be forced to waive their ability to join together as a condition of employment.

2. Any contract term that requires an individual employee to waive his right to engage in concerted

activities as a condition of employment is thus illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. The Employers' interpretation of the Federal Arbitration Act ("Arbitration Act") would render these protections meaningless whenever an arbitration agreement is at issue. That is not what Congress intended. Congress intended the Arbitration Act to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). By contrast, the Employers' interpretation would elevate arbitration agreements over every other type of contract.

Similarly, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), does not require that federal courts enforce concerted-action waivers that are illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. Here, unlike in *Concepcion*, there is no evidence that a generally applicable rule invalidating otherwise illegal contract terms was intended to "disfavor[] arbitration," *id.* at 341; would have a "disproportionate impact" on arbitration agreements, *id.* at 342; or would "interfere[] with fundamental attributes of arbitration," *id.* at 344.

In particular, the rule applied here by the Seventh and Ninth Circuits does not conflict with arbitration's fundamental attributes, because those courts merely invalidated contract terms that require individual employees to waive *all* rights to *all* types of concerted legal claims. This Court has never suggested that arbitration's fundamental attributes prohibit every

kind of group claim in every kind of arbitration proceeding.

To the contrary, both the standard joinder of related claims and the collective action mechanism under the Fair Labor Standards Act are consistent with the fundamentals of arbitration. These types of joint proceedings are not as formal as the consumer class actions in *Concepcion*, do not require the same kind of procedural formality to protect absent members, and do not risk changing the stakes of arbitration by aggregating tens of thousands of claims.

Even if the Employers' interpretation of the Arbitration Act were correct, however, that statute would yield to the NLRA and Norris-LaGuardia Act. These two later-enacted labor statutes, not the Arbitration Act, govern whether employers may dictate the terms under which their employees can join together for "mutual aid or protection." After all, the NLRA and Norris-LaGuardia Act were designed to protect employees from being forced to sign away their ability to act collectively, a purpose that would be defeated if employers were allowed to dictate the terms under which their employees may act collectively.

3. Finally, a ruling in favor of the Employers would harm the states and lead to the systemic underenforcement of state and federal workplace protections, including wage-and-hour laws and anti-discrimination statutes.

If employees must bring all of their claims individually, most workers will not bring claims at all because

(a) workers often fear that filing claims individually, rather than collectively, will make them the target of reprisal by employers; (b) in the absence of a collective suit, workers may not even know that their rights have been violated; (c) an individual employee's claim is likely to be small, deterring him from filing a claim; and (d) employees often cannot prove pattern-and-practice claims without participation from their peers.

As a result, an individual employee's only real alternative to collective arbitration is not bilateral arbitration. It is no arbitration. Of course, many employers know that concerted-action waivers will decrease the number of claims against them and will insulate them from liability; that is often why their form contracts include these provisions.

This reduction in private enforcement will impose on state and federal regulators the need to fill the void. But state and federal employment laws were designed to be enforced primarily by employees, not by government agencies. We thus rely on the ability of individual employees to band together and enforce their workplace rights. Although state and federal regulators play an important role, they are already overburdened. State enforcement agencies also continue to struggle with chronic budget shortfalls, layoffs, and hiring freezes. These resource constraints mean that at any given time the states' enforcement efforts are, at best, merely scratching the surface of potential violations.

For these reasons, if this Court lends its imprimatur to the Employers' tactics, the result will be the systemic under-enforcement of state and federal law. That cannot be what Congress intended. Congress sought to encourage robust enforcement, not to encourage employers to foster creative pathways to evade compliance.

ARGUMENT

Imagine a single mother, laid off from work months ago, who has been unable to land a job and whose unemployment benefits are about to expire. A local employer offers her a job but asks that she sign a form contract. The contract not only requires arbitration of any disputes but also prohibits joint claims involving more than one employee. Similarly, imagine a worker employed for nearly thirty years with the same company and one year from eligibility to retire with a full pension. One day, his supervisor explains that he must sign an agreement waiving his ability to bring any collective claims, or be fired. *See, e.g.*, *Everglades College, Inc.*, 363 N.L.R.B. No. 73 (Dec. 23, 2015), petition for review pending No. 16-10341 (11th Cir.) (involving a plaintiff who was fired for refusing to sign a mandatory arbitration agreement that included a ban on concerted legal action).

These individuals, and many others like them, have no real choice but to sign these agreements. Perhaps in theory they could reject the contracts or try to

haggle over the terms, but someone in their shoes could not take that risk. Putting abstract theory aside, the "reality of the workplace is that workers have no meaningful opportunity to negotiate the terms of" these types of "take-it-or-leave-it arbitration . . . clauses." Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1133 (2012).

Recognizing this reality, the Norris-LaGuardia Act, the NLRA, and many state analogues grant individual employees the right to join together in concerted activities and, just as importantly, protect these employees from being forced to sign away that right just to earn a living. *See* Part I, *infra*. The Federal Arbitration Act does not override those rights. *See* Part II, *infra*. If the law were otherwise, it would dramatically reduce the private enforcement of federal and state workplace protections. Because states do not have sufficient resources to make up for that reduction in private enforcement, that would lead to the systemic under-enforcement of these important workplace protections. *See* Part III, *infra*.

I. CONGRESS AND THE STATES HAVE LONG RECOGNIZED THAT INDIVIDUAL EMPLOYEES NEED A RIGHT TO ENGAGE IN "CONCERTED ACTIVITIES" TO ENJOY TRUE FREEDOM OF CONTRACT.

Both Congress and the states have long recognized that individual workers have a "fundamental right,"

Jones & Laughlin Steel Corp., 301 U.S. at 33, to engage in concerted activities for their mutual aid or protection. Initially, Congress and many states passed laws declaring unenforceable contracts that required individual employees to waive any ability to join together to improve their working conditions. Later, Congress and the states enacted the NLRA and state analogues to guarantee workers a substantive right to engage in concerted activities. Together, these statutes ensure that individual employees no longer have to "accept unconditionally the terms laid down by the employer," including terms that – like those in the arbitration clauses at issue here – require an employee to "singly present any grievance." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris on the Norris-LaGuardia Act).

1. During the early 20th Century, many employers required employees to waive, as a condition of employment, their right to join together in concerted action. *See generally* Joel I. Seidman, *The Yellow Dog Contract* (1932); Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014). These agreements, called "yellow dog" contracts, typically prohibited employees from joining a union and often went further, "proscrib[ing] *all* manner of concerted activities." Finkin, *supra*, at 16 (emphasis added). Although individual employees lacked any real power to refuse to sign these agreements, courts nonetheless issued injunctions enforcing them. *See, e.g.*, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Employers thus grew more and

more brazen in playing "[a]n almost endless array of legal games . . . that made almost all collective action by workers susceptible to legal prohibitions." Finkin, *supra*, at 14-15 (quoting Daniel Jacoby, *Laboring for Freedom: A New Look at the History of Labor in America* 62 (1998)).

Although many states attempted to solve this problem by prohibiting employers from using certain types of yellow dog contracts, *see* Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 Yale L.J. 879, 889 (1929), these statutes were usually invalidated under then-prevalent notions about liberty of contract. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915) (overturning a state statute that had prohibited employers from requiring employees not to join a union); *Adair v. United States*, 208 U.S. 161 (1908) (overturning provisions in a similar federal law).

Several states then enacted statutes, modeled after a provision in the Clayton Act, limiting the jurisdiction of state courts to issue injunctions in labor cases. *See* Frankfurter & Greene, *supra*, at 918-19 (citing laws in Arizona, Illinois, Kansas, Minnesota, New Jersey North Dakota, Oregon, Utah, Washington, and Wisconsin). But again these laws were invalidated, or narrowly construed, by the courts. *Id.* at 917-20; *see also Traux v. Corrigan*, 257 U.S. 312 (1921) (finding Arizona's law unconstitutional).

Starting in 1929, therefore, some states began to try a new approach. These states passed statutes declaring void and unenforceable all contracts that required an employee to agree "not to join, become, or remain, a member of any labor organization" and all contracts that allowed employers to terminate an employee "in the event that he joins, becomes, or remains a member of any labor organization." 1929 Wis. Sess. Laws ch. 123; 1931 Ariz. Sess. Laws ch. 19; 1931 Colo. Sess. Laws ch. 112; 1931 Ohio Laws at 562; 1931 Or. Laws ch. 246.

In 1932, Congress went even further and passed the Norris-LaGuardia Act to end permanently the era of the yellow dog contract. As Congress expressly declared, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and . . . thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102. To solve this problem, Congress did three things in the act.

First, Congress curtailed the jurisdiction of the federal courts to issue injunctions in labor cases. Second, Congress declared, as the public policy of the United States, that workers must "be free from the interference, restraint, or coercion of employers" in "self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. Third, and most importantly for purposes of this case, Congress mandated that any contract "in conflict with th[is] public policy . . . shall not be enforceable in any court of the United States," 29 U.S.C. § 103, and that "[a]ll acts and parts

of acts in conflict with the provisions of this chapter are repealed," 29 U.S.C. § 115.

By these terms, the 1932 Norris-LaGuardia Act went further than any state law on the books at the time. The new federal law rendered unenforceable not only contract terms that required employees to waive their right to form a union, but also all other terms that "interfere[d]" with employees' ability to engage in "concerted activities for . . . mutual aid or protection." 29 U.S.C. §§ 102, 103. This broader language was no accident; "the draftsmen sought to give the policy announced in [the statute] the broadest possible sweep" to combat the "endless array of legal games" being played by employers. Finkin, *supra*, at 15 (internal quotation marks omitted). As one of the law's sponsors explained, Congress intended the Norris-LaGuardia Act to end the regime under which "the laboring man must accept unconditionally the terms laid down by the employer" and must agree as a condition of employment to "singly present any grievance." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris).

In recognition of these same principles, many states soon enacted so-called "little Norris-LaGuardia acts." Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 Hofstra Lab. L.J. 97, 108 (1993). Maryland's law, for example, affirms that an "individual worker" is often "helpless to exercise liberty of contract," and declares that workers must be "free from coercion, interference, or restraint by an employer" when engaging in

"concerted activity for the purpose of collective bargaining or other mutual aid or protection." Md. Code Ann., Lab. & Empl. § 4-302. Other states' little Norris-LaGuardia Acts typically include similar declarations of public policy.[1]

Unlike the state laws that preceded the Norris-LaGuardia Act, many of these subsequent state statutes also render unenforceable in state court *any* contract that conflicts with the statute's stated public policy, not just those that prohibit employees from joining a union.[2] These statutes, like the federal act, thus render unenforceable all contract terms requiring individual employees to waive their right to engage in concerted activities for their mutual aid or protection.

2. Three years later, Congress took another step to protect workers. In 1935, Congress enacted the NLRA – also known as the Wagner Act – to reduce industrial strife, to ensure that employees could exercise "actual liberty of contract," and to "restor[e] equality of bargaining power between employers and employees." 29 U.S.C. § 151. The statute granted individual employees express rights to form and join labor unions

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[1] *See, e.g.*, Cal. Labor Code § 923; 22 Guam Code Ann. § 5302; Haw. Rev. Stat. § 380-2; Idaho Code § 44-701; 820 Ill. Comp. Stat. 5/1.2; Ind. Code § 22-6-1-2; La. Rev. Stat. Ann. § 23:822; Minn. Stat. § 185.08; N.D. Cent. Code § 34-08-02; Or. Rev. Stat. § 662.020; Pa. Stat. Ann. tit. 43, § 206b; Utah Code Ann. § 34-19-1; Wash. Rev. Code § 49.32.020; Wis. Stat. § 103.51; Wyo. Stat. Ann. § 27-7-101.

[2] *E.g.*, 22 Guam Code Ann. § 5303; Haw. Rev. Stat. § 380-3; Ind. Code § 22-6-1-3; Minn. Stat. § 185.09; Or. Rev. Stat. § 662.030; Wash. Rev. Code § 49.32.030.

and to engage in "other concerted activities for the purpose of . . . mutual aid and protection." 29 U.S.C. § 157. As is particularly important here, the law also made it illegal for employers to interfere in any way with those rights. 29 U.S.C. § 158. The purpose of these provisions was "to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Following Congress's lead, after passage of the NLRA, many states enacted "little Wagner Acts" to grant employees not covered by the NLRA the same "right" to engage in "concerted activities" for their "mutual aid or protection."[3] These laws, like the NLRA, are grounded in the reality that most individual workers cannot exercise "actual liberty of contract,"[4] and in the desire to ensure that "[n]egotiation of terms and conditions of work should result from voluntary agreement

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[3] Colo. Rev. Stat. § 8-3-106; Conn. Gen. Stat. § 31-104; Haw. Rev. Stat. § 377.4; Kan. Stat. Ann. § 44-803; Mass. Gen. Laws ch. 150A § 3; Mich. Comp. Laws § 423.8; Minn. Stat. § 179.10; Neb. Rev. Stat. § 48-904; N.Y. Labor Law § 703; Or. Rev. Stat. § 663.110; Pa. Stat. Ann. tit. 43, § 211.5; R.I. Gen. Laws § 28-7-12; S.D. Codified Laws § 60-9A-2; Vt. Stat. Ann. tit. 21, § 1503; Utah Code Ann. § 34-20-7; 24 V.I. Code § 64; W. Va. Code § 21-1A-3; Wis. Stat. § 111.04. Some states that do not have little Wagner Acts nonetheless recognize the right of employees to engage in "concerted activities" in other places in their codes. *E.g.*, Fla. Stat. § 447.03; N.D. Cent. Code § 34-12. The Commonwealth of Puerto Rico has even enshrined this right in its Constitution. P.R. Const., art. II, § 18.

[4] *E.g.*, Mass. Gen. Laws ch. 150A § 1; Pa. Stat. Ann. tit. 43, § 211.2; R.I. Gen. Laws § 28-7-2.

between employer and employee."[5] Little Wagner Acts protect some of the most vulnerable members of our society, including employees of certain small businesses and, in many cases, independent contractors and agricultural laborers. *See* U.S. Government Accountability Office ("GAO"), GAO-02-835, *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*, at 41-42 (Sept. 2002).

Together, the Norris-LaGuardia Act, the NLRA, and their state analogues stand for the same basic proposition: Individual employees need the ability to join together to meaningfully protect their interests, and employers should not be able to force employees to sign away that ability just to earn a living.

II. The Federal Arbitration Act Does Not Override the Rights of Employees to Engage in Concerted Activities.

As the National Labor Relations Board ("NLRB") and the Employees have explained, arbitration clauses that require individual employees to waive all collective claims violate the right to engage in "concerted activities" under § 7 of the NLRA and constitute yellow dog contracts that conflict with § 103 of the Norris-LaGuardia Act. *See* Brief of Pet'r NLRB at 22-35; Brief of Resp. Morris at 30-35; Brief of Resp. Lewis at 26-34;

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[5] *E.g.*, Colo. Rev. Stat. § 8-3-102; Neb. Rev. Stat. § 48-901; Utah Code Ann. § 34-20-1; *see also* Cal. Labor Code § 923 (expressing the same view in a related context); Nev. Rev. Stat. § 614.090 (same).

Brief of Resp. Hobson at 28-34, 54. Such waiver provisions are thus illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. The only remaining question is whether the Arbitration Act supersedes these labor statutes and makes the waivers enforceable. It does not.

By its own terms, the Arbitration Act's saving clause permits enforcement of a generally applicable rule voiding any contract term, whether in an arbitration agreement or otherwise, that is illegal under the NLRA or unenforceable under the Norris-LaGuardia Act. But, even if that were not the case, the Arbitration Act must give way to the later-enacted NLRA and Norris-LaGuardia Act. Congress enacted those two statutes to protect workers from being forced to sign away their rights to join together for mutual aid or protection. Whatever the state of the law before those enactments, therefore, employers may not require individual employees to prospectively waive their rights under those statutes.

1. The Arbitration Act provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this text unmistakably suggests, Congress intended to make "arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp.*, 388 U.S. at 404 n.12 (emphasis added). A correct reading of the saving clause thus preserves the longstanding rule from *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332

(1944), that contract terms mandating "the renunciation by employees of rights guaranteed by" the NLRA are illegal, *National Licorice Co.*, 309 U.S. at 361, and "must yield" to the NLRA, *J.I. Case Co.*, 321 U.S. at 337.

In contrast, the Employers' interpretation of the Arbitration Act would elevate arbitration agreements to a special place of privilege above every other type of contract: Even though the NLRA would void all other contract provisions that required individual employees to waive their rights, the same waiver contained in an arbitration agreement would be protected from scrutiny. This would turn congressional intent on its head. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924) (explaining that Arbitration Act would put arbitration agreements "upon the *same footing* as other contracts" (emphasis added)).

Nor does *Concepcion* require the NLRA or Norris-LaGuardia Act to yield to the Arbitration Act. That decision, as the NLRB and the Employees have explained, rested on principles of obstacle preemption, and these principles have no relevance when harmonizing (or choosing between) two co-equal federal statutes. *See* NLRB Br. at 40; Lewis Br. at 40; Hobson Br. at 38-39. But even if *Concepcion* were applicable, the saving clause would still preserve a generally applicable rule rendering void any agreement that violates either the NLRA or the Norris-LaGuardia Act (or one of the state analogues to those statutes).[6]

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[6] For this reason, the Employers are wrong to suggest that, if a state adopted the same facially neutral rule adopted by the

In *Concepcion*, this Court held that the saving clause did not encompass a state common-law rule that, though neutral on its face, was intended to "disfavor[] arbitration," 563 U.S. at 341; had a "disproportionate impact" on arbitration agreements, *id.* at 342; and "interfere[d] with fundamental attributes of arbitration," *id.* at 344. But none of these three factors are present here.

As an initial matter, there is no evidence that the rule from *National Licorice* and *J.I. Case* on which the Sixth, Seventh, and Ninth Circuits relied – namely, invalidating contract terms that require employees to renounce their rights to engage in concerted activities – was intended to disfavor arbitration or to circumvent this Court's much later cases interpreting the Arbitration Act. The rule was instead designed to protect employees' rights to join together for their mutual aid or protection, rights that are meaningless if employers can force individual employees to waive them as a condition of employment.

Similarly, far from having a disproportionate impact on arbitration, this generally applicable rule applies equally to a vast array of contracts other than arbitration agreements. The rule invalidates any contract term that requires an individual employee to waive his or her rights to engage in concerted activities as a condition of employment, regardless of the type of

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Sixth, Seventh, and Ninth Circuits, "that state law would be preempted by the Arbitration Act." Brief for Pet'r Ernst & Young at 16.

contract. Under the rule, therefore, an employer may still require that its employees sign an arbitration agreement so long as the terms of the agreement do not violate the employees' rights to act collectively.

The rule also does not conflict with the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. *Concepcion* held that a rule requiring employers to permit *class* arbitration in *consumer* cases conflicted with the Arbitration Act. *See id.* But the rule here, as applied by the Sixth, Seventh, and Ninth Circuits, did no such thing; it merely invalidated contract terms that required individual employees to waive *all* rights to *all* types of concerted legal claims, in both court and arbitration. This Court has never suggested that it is a fundamental attribute of arbitration to prohibit every kind of group claim in every kind of arbitration proceeding.

According to *Concepcion*, requiring class arbitration in consumer cases conflicted with the Arbitration Act only because: (1) class procedures make the process too formal, sacrificing the supposed efficiency of arbitration, 563 U.S. at 348-49; (2) the class mechanism "*requires* procedural formality" to ensure that absent class members will be "bound by the results of the arbitration," *id.* at 349 (emphasis in original); and (3) class actions create stakes that are too high for arbitration by aggregating "tens of thousands of potential claimants," *id.* at 350.

These same concerns do not apply to other types of joint legal actions, such as the standard joinder or

consolidation of related claims and collective actions under the Fair Labor Standards Act ("FLSA"). *See* Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175, 192-99 (2014). To the contrary, joint legal action by employees in the form of either joinder or collective action is consistent with arbitration.[7] *See id.*

With respect to joinder, for example, an arbitration involving a small number of employees with related claims will not be any more formal or any less efficient than a bilateral arbitration. A joint case also would not require the same type of special procedural formality as in a class action, given that there are no absent parties whose due process rights must be protected. And there is no risk that the joinder of claims will "change the stakes" of arbitration, *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 639-40 (7th Cir. 2011) (Easterbrook, J.) (distinguishing class arbitration from the consolidation of related claims), because joinder will never result in the aggregation of "tens of thousands" of claims into one proceeding, *Concepcion*, 563 U.S. at 350.

Similarly, with respect to collective actions under the FLSA, this Court has recognized that collective

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[7] Because the arbitration agreements at issue here prohibit all types of concerted legal action, there is no need to decide whether requiring the availability of an *employment* class action (as opposed to a consumer class action) would be inconsistent with the fundamental attributes of arbitration or whether an arbitration clause that requires employees to waive class actions – but not other joint legal actions – would be enforceable.

actions are "fundamentally different" from class actions, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013), especially compared to the consumer class actions at issue in *Concepcion*. Unlike with class actions, an employee must affirmatively opt into an FLSA collective action. 29 U.S.C. § 216. Thus, no special procedural formality would be required to protect the due process rights of absent employees; the "only plaintiffs who will be bound" in a collective arbitration under the FLSA are those who "receive notice of the action and choose to join it." Fisk, *supra*, at 196.

Collective actions also tend to be much smaller than class actions, and are unlikely to involve tens of thousands of claimants. *See In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2287 (2012). This is because plaintiffs have to opt into a collective action, which only about 16% of potential plaintiffs do, and because the universe of potential plaintiffs is smaller in the employment context, where the average employer has only 20 employees. *See* Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post*-Concepcion, 34 Cardozo L. Rev. 359, 385-87 (2012). The collective arbitration of these types of claims, like the joinder of such claims, is thus "far less cumbersome and more akin to an individual arbitration" than class arbitration, especially consumer class arbitration. *D.R. Horton*, 357 N.L.R.B. at 2287.

In light of this reality, there is no reason for requiring employees to waive these types of joint actions other than that most workers are powerless to refuse and – as explained more in Part III below – many

workers will not bring claims at all if they cannot join together with their fellow employees. Thus, contrary to the Employers' protestations, the Arbitration Act does not compel the federal courts to enforce these waivers.

2. Even if the Employers' interpretation of the saving clause were correct, the Arbitration Act does not override an employee's substantive rights under the NLRA or the express requirements of the Norris-LaGuardia Act.

The NLRA and the Norris-LaGuardia Act, not the Arbitration Act, govern whether employers may dictate the terms under which their individual employees can join together for "mutual aid or protection." 29 U.S.C. §§ 102, 157. Congress designed these two labor statutes to protect employees from being forced to sign away their right to act collectively. *See supra* at 10-14. Allowing employers to dictate the terms under which their employees may act collectively would thus run counter to everything that Congress sought to accomplish.

Put another way, Congress did not intend to authorize employers to exploit their bargaining power to force employees to waive the very rights that were intended to protect them from that unequal bargaining power in the first place. Indeed, Congress made that clear in specifying that the Norris-LaGuardia Act repealed all "acts and parts of acts" that "conflict with" its provisions. 29 U.S.C. § 115. That includes any conflicting provision in the previously enacted Arbitration Act.

Although unionized employees may waive some concerted activities as part of a collective bargaining agreement, the Employers are wrong to suggest that this ability to bargain away rights *collectively* means that employees may be compelled to waive those rights *individually* as a condition of their employment. *See* NLRB Br. at 29-30. When unionized employees negotiate with their employers, the union and employer bargain on roughly equal terms, and thus the employees will receive something of value in return for agreeing to arbitrate all of their claims bilaterally. But, as Congress expressly recognized in enacting the NLRA and Norris-LaGuardia Act, the same is not true for most individual employees. *See* 29 U.S.C. §§ 102, 151. Allowing employers to effect waivers of the right to concerted activity through individual employment contracts, which most employees lack any meaningful ability to refuse to sign, would thwart the purposes of the NLRA and Norris-LaGuardia Act.

There was a time, of course, when federal courts relied on outdated notions of freedom of contract to override laws protecting employees from being forced to sign away their right to engage in concerted activities. *See, e.g.*, *Coppage*, 236 U.S. at 9-25; *Adair*, 208 U.S. at 173-76. Those decisions, like the Employers' arguments here, rested on the misguided belief that an individual employee is just as free to "sell his labor upon such terms as he deems proper" as an employer is "to prescribe the conditions upon which he will accept such labor." *Adair*, 208 U.S. at 175; *see* Brief for Murphy Oil USA in Support of Cert. at 26-27 ("[T]he

Agreements memorialize a beneficial quid pro quo for both Murphy USA and its employees: employees agree to arbitrate any employment-related claims on an individual basis in exchange for the benefit of new employment.").

In enacting the NLRA and the Norris-LaGuardia Act, however, Congress recognized that individual employees generally do *not* have "actual liberty of contract" when negotiating with their employers. 29 U.S.C. §§ 102, 151. This Court should thus follow Congress's lead and leave the Employers' antiquated conceptions of liberty of contract in the past, where they belong.

III. Allowing Employers to Prevent Employees from Pursuing Collective Claims Would Hamper Enforcement of State and Federal Workplace Protections, Impose Additional Burdens on Government Regulators, and Cause Systemic Under-Enforcement of State and Federal Laws.

Employees who have suffered violations of workplace protections are less likely to bring private enforcement actions when they cannot combine their legal claims. Because government regulators depend on employees to help enforce these state and federal statutes, a ruling negating the ability of employees to arbitrate collectively would put increased pressure on already overtaxed federal, state, and local agencies. Accordingly, a reduction in private enforcement will lead

to the systemic under-enforcement of state and federal laws designed to protect American workers.

1. There is currently an epidemic of wage theft sweeping across the nation, with especially devastating effects on our country's low-wage workers. According to a leading survey of low-wage workers, 26% reported being paid less than the minimum wage and 76% reported being underpaid or not paid at all for overtime. Ruan, *supra*, at 1110 (citing Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2, 20 (2009)). As a result of these violations, employers may be stealing up to $50 billion every year from low-wage workers. *See* Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, Economic Policy Institute (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/.

To combat this epidemic, workers must have the ability to join together. Experience shows that individual workers, especially low-wage workers, typically do not challenge wage theft on their own, for at least four reasons.

First, individual employees are often reluctant to file claims because they fear reprisal. Although federal law forbids retaliation, employees know full well that many employers fire, suspend, or demote employees

who file complaints. Ruan, *supra*, at 1120 (noting that 43% of workers reported suffering from these types of reprisals); *see also* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Policy J. 59, 83 (2005). According to California's Labor Commissioner, "fear is the number one reason why workers do not complain about wage theft." Myron Levin, *Fear Stifles Wage Abuse Complaints*, Tucson Sentinel (May 19, 2014), http://www.tucsonsentinel.com/nationworld/report/051914_wage_abuse/fear-stifles-wage-abuse-complaints/. Low-wage workers are "particularly vulnerable to retaliation because many live 'paycheck to paycheck' in mostly low-skilled jobs, where employers consider them replaceable and therefore expendable." *Id.* Therefore, a low-wage worker may reasonably conclude that his individual claim is not large enough to justify the potential risk of reprisal. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457, 497 (1992).

Second, employees may not even "know that their rights are being violated" unless and until another colleague files suit. *Id.* at 496. That is why the notice and opt-in procedures of the FLSA are so important; they provide an easy way for an employee to inform his coworkers that their employer has violated their legal rights and to invite others to join in a suit. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev.

1309, 1348 (2015) (explaining how collective actions under the FLSA serve an important notice function).

Third, an individual's claim for damages is likely to be small. *See* Summers, *supra*, at 497. Most employees, particularly low-wage workers, simply cannot "afford the time and expense it would take to prosecute [these low-value] claims individually." Ruan, *supra*, at 1119. And even if an individual employee wants to file an arbitration claim, the limited size of the potential recovery will make it difficult to find a lawyer. *See* Sternlight, *supra*, at 1334-40.[8]

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[8] Many attorneys are also unwilling to take individual arbitration cases because a plaintiff's chances of winning in arbitration are lower than in court, and damage awards are lower, too. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 2015), http://www.epi.org/publication/the-arbitration-epidemic/. Based on outdated statistics, the Chamber of Commerce argues that claimants fare just as well in arbitration as in litigation. *See* Amicus Br. of Chamber of Commerce at 34. But more recent studies show that employees are in fact less likely to recover in arbitration than in court *and* that average recoveries in arbitration are lower than in court. *E.g.*, Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 79-80 (2014) (summarizing information from multiple studies); *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N. Carolina L. Rev. ___ (forthcoming 2018). For instance, one study found that employees recovered compensation in only 21.4% of arbitrations as compared to 57% of state court employment cases and that the median award was over $30,000 less in arbitrations than in state court cases. Colvin, *supra*, at 79-80.

Fourth, many claims are difficult for an individual worker to substantiate without the help of other claimants because they depend on proving "corporate policies, patterns, and practices." Ruan, *supra*, at 1123. For instance, proving that an employer impermissibly failed to pay workers for off-the-clock work typically requires employees to show "a pattern or practice of employer acquiescence" in the uncompensated work. *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). Given that it "can be difficult" for a single plaintiff "to identify and prove" these types of "systemic violations," an individual worker will often decide not to bring a claim at all. Ruan, *supra*, at 1123.

These hurdles apply to more than just wage theft cases. Individual workers are also less likely to bring claims for violations of other workplace protections. For example, a worker faces the same types of hurdles in bringing a discrimination claim against his or her employer, particularly the fear of reprisal. *See* Sternlight, *supra*, at 1333-52; Summers, *supra*, at 480-90; *see also* W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. Pub. L. 411, 445 (2003).

2. Too often, therefore, an employee's only real alternative to collective arbitration is not bilateral arbitration; it is no arbitration. Indeed, according to one expert, "almost no . . . employees 'do' arbitration at all," in no small part because of "the bans on collective actions" written into many arbitration agreements. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the*

Erasure of Rights, 124 Yale L.J. 2804, 2814-15 (2015); *see also* Sternlight, *supra*, at 1330-31 (finding that only one out of every 12,000 employees covered by a mandatory arbitration clause files an arbitration claim in a given year).

That problem has only worsened for workers since *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2014), which further emboldened employers to insist on concerted-action waivers. For example, a survey by a consulting firm that represents employers found that the percentage of companies using class action waivers in their arbitration agreements skyrocketed from 16% in 2012 to almost 43% in 2014. *See* The 2015 Carlton Fields Jorden Burt Class Action Survey: *Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 26, http://classactionsurvey.com/2015-survey/. Around the same time, from January to December 2013, there was also a "plunge" of 65% in the number of employees who filed arbitration claims. David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 469 (2016).

These trends are no coincidence. Employers "well know . . . that few individual employees will bring claims." Sternlight, *supra*, at 1345. That is why so many employers include these clauses in the first place – to insulate themselves from liability. *Id.*; *see also* Theodore Eisenberg, et al., *Arbitration's Summer Soldiers*, 41 U. Mich. J. L. Reform 871, 894-95 (2008) (concluding based on empirical evidence that corporations in at

least some industries use arbitration agreements to "avoid[] aggregate dispute resolution" with consumers but, when dealing with their peers, actually prefer litigation to arbitration). Whatever the merits of such choices in other contexts, Congress has prohibited employers from using these types of tactics in the employment context. *See supra* at 10-14.

Although the Chamber of Commerce asserts that bilateral arbitration is "beneficial" to employees because it is less expensive than filing a claim in court, Chamber Br. at 32-33, there is "little evidence" that requiring bilateral arbitration actually "opens doors to dispute resolution that [are] otherwise closed," Resnik, *supra*, at 2901. In reality, the small number of arbitration claims demonstrates that concerted action waivers "erase rather than to enhance the capacity to pursue rights." *Id.* at 2893.

3. The void created by this reduction in private enforcement likely cannot be filled by state and federal regulators. Most state and federal employment laws were designed to be enforced primarily by employees, rather than government agencies. With respect to the FLSA, for example, Congress purposefully "established a regulatory scheme that was largely dependent on enforcement by private litigation." J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1150 (2012). Indeed, "[o]ver time, Congress increased incentives for private suits under the FLSA, while simultaneously limiting funding for" government enforcement. *Id.*

The same is true for anti-discrimination statutes. The EEOC "was not designed to challenge every instance of discrimination in U.S. employment." Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 844 (2004); *see also* 2007 Md. Laws ch. 177 (amending Maryland's anti-discrimination law, which initially relied solely on government enforcement, to provide for a private right of action). Instead, the bargain that Congress struck in enacting Title VII of the Civil Rights Act of 1964 was to rely heavily on private suits by employees in lieu of more "vigorous enforcement" by the EEOC. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 383-84 (2010) (summarizing the compromises made during the legislative debates on Title VII).

Although state and federal regulators play an important role, these already overburdened regulators do not have the resources to make up for a reduction in private enforcement. For example, the United States Department of Labor (the "Department"), which is charged with enforcing federal wage-and-hour laws, receives more than 20,000 complaints per year,[9] and has long struggled to respond to all of them. *See* GAO, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigate Processes Leave Low Wage Workers Vulnerable to Wage Theft* (Mar. 25, 2009), http://www.gao.gov/assets/130/122107.pdf. Even as the

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[9] Department of Labor, Wage and Hour Division Data Tables, https://www.dol.gov/whd/data/datatables.htm.

number of workplaces subject to the Department's jurisdiction has grown, funding from Congress has not kept pace. *See* Annette Bernhardt & Siobhan Mcgrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor 1975-2004*, Brennan Center for Justice, at 2 (Sept. 1, 2005). As a result, the number of enforcement actions filed by the Department under the FLSA fell by 36% from 1975 to 2004. *Id.*

State regulators suffer from similar resource challenges. According to a 2011 study, many of the state agencies responsible for enforcing wage-and-hour laws receive thousands of complaints per year. *See* Jacob S. Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* 98-106 (April 2011). But a majority of these agencies had fewer than 25 employees devoted to wage-and-hour enforcement, and many agencies had fewer than ten employees. *Id.* at 73-80.

Most states also continue to struggle with chronic budget shortfalls[10] and many of those states have been

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[10] *See, e.g.*, Ryan Maness, *Thirty-One States Face Revenue Shortfalls for the 2017 Fiscal Year*, MultiState Insider (Jan. 3, 2017), https://www.multistate.us/blog/thirty-one-states-face-revenue-shortfalls-for-the-2017-fiscal-year; National Ass'n of State Budget Officers, *Summary: Spring 2017 Fiscal Survey of States*, 1 (June 15, 2017), http://www.nasbo.org/mainsite/reports-data/fiscal-survey-of-states (explaining that "[g]eneral fund revenues . . . are coming in below original budget forecasts in 33 states" in 2017 and that "[f]iscal 2016 and fiscal 2017 were marked by lackluster general fund revenue growth, resulting in numerous revenue shortfalls and requiring many states to make mid-year budget cuts in one or both years").

forced to cut funds and to institute prolonged hiring freezes. Irene Lurie, *Enforcement of State Minimum and Overtime Laws: Resources, Procedures, and Outcomes*, 15 Employee Rts. & Emp. Pol'y J. 411, 421 (2011); Meyer & Greenleaf, *supra*, at 22; *see also* Spencer Woodman, *The Wage Theft Epidemic*, In These Times (Feb. 20, 2013), http://inthesetimes.com/article/14595/wage_theft_epidemic (recounting the effects of past budget cuts in Hawaii, Iowa, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wisconsin).

A lack of staff has thus been "a perennial constraint" for state regulators in enforcing their wage-and-hour laws. Lurie, *supra*, at 421. Because of these limited resources, state agencies, despite their best efforts, are usually "just scratching the surface" of potential violations and must rely solely on complaints from employees to uncover problems. *Id.* (quoting one state administrator). Some states do not even have an agency that "engages in *any* meaningful enforcement of wage and hour standards," Meyer & Greenleaf, *supra*, at 16 (emphasis added), and must rely solely on enforcement by the federal government or by private employees.

Recently, the growing wage theft epidemic has put even more pressure on already under-resourced state agencies. For instance, "an exploding caseload" in 2015 "overwhelmed [the] small staff" at North Dakota's Department of Labor. Mike Nowatzki, *Spike in Complaints Leads to Investigation Backlog at N.D. Labor Department*, Bismark Tribune (Oct. 23, 2015); *see also*

Woodman, *supra* (quoting former state investigators who were forced to try to personally handle anywhere from 250 to 1000 claims every year). The states thus lack the resources to solve this problem on our own. We need help from employees.

The same is true for the enforcement of state and federal anti-discrimination laws. At the federal level, the EEOC suffers from severe resource constraints and an ever-shrinking budget, meaning that it receives far more complaints than it can handle on an annual basis. *See* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. Rev. 1133, 1143 (2015). The agency has "never successfully cleared" this "persistent backlog." *Id.* at 1144.

Like the EEOC, state and local agencies also often "lack the requisite funding to efficiently enforce" state and local anti-discrimination laws. Timothy A. Galáz, *Bargaining for the Next Gay Player: How Can Jason Collins Help to Develop the National Basketball Association into a More Inclusive Workplace?*, 21 Jeffrey S. Moorad Sports L.J. 461, 499 (2014); *see also* Katherine Tonnas, *The Louisiana Commission on Human Rights: Committed to Protecting Citizens from Discriminatory Practices*, 51 La. B.J. 266, 266 (2003) (quoting the former Chair of the Louisiana Commission on Human Rights, expressing disappointment that the Commission had not been able to do its job because it had not been adequately funded).

4. A ruling in favor of the Employers here, therefore, would lead to the systemic under-enforcement of state and federal employment laws. In addition to hurting employees, this systemic under-enforcement would also "disadvantage [those] responsible employers who are forced to compete with unscrupulous competitors." Ruan, *supra*, at 1111. Indeed, unscrupulous employers stand to benefit more than anyone because joint legal action plays an even more important role in combating widespread, systemic violations of the law than it does in deterring isolated incidents. Some law-abiding employers might even feel pressure to start breaking the law themselves. After all, when the costs of complying with the law are greater than costs of breaking the law, employers have an inherent incentive to cheat.

In sum, this Court should not sanction employers' efforts to "free themselves to violate wage and hour laws, to discriminate, to impose unsafe working conditions, and to otherwise violate federal and state labor and employment laws with impunity." Sternlight, *supra*, at 1313-14. That is not what Congress wanted. Congress sought to encourage robust enforcement of employment laws, not encourage employers to foster creative pathways to evade compliance.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be affirmed, and the judgment in No. 16-307 should be reversed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General
of Maryland

STEVEN M. SULLIVAN
Solicitor General

PATRICK B. HUGHES
Assistant Attorney General
Counsel of Record
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6579
phughes@oag.state.md.us

XAVIER BECERRA
Attorney General
of California
California
Department of Justice
1300 I Street, Suite 11000
Sacramento, CA 95814

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

MATTHEW P. DENN
Attorney General
of Delaware
Carvel State Building,
6th Floor
820 North French Street
Wilmington, DE 19801

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street,
12th Floor
Chicago, IL 60601

THOMAS J. MILLER
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

MAURA HEALEY
Attorney General
Commonwealth
of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

JOSH STEIN
Attorney General
State of North Carolina
114 W. Edenton Street
Raleigh, NC 27603

ELLEN F. ROSENBLUM
Attorney General
of Oregon
1162 Court Street N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
of Pennsylvania
16th Fl., Strawberry Sq.
Harrisburg, PA 17120

PETER F. KILMARTIN
Attorney General,
State of Rhode Island
150 S. Main St.
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
of Vermont
109 State Street
Montpelier, VT 05609-1001

MARK R. HERRING
Attorney General
of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

KARL A. RACINE
Attorney General for the
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, DC 20001

RECORD
AND
BRIEFS.

Nos. 16-285, 16-300, 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORP.,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG, et al.,
Petitioners,
v.
STEPHEN MORRIS, et al.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh and Ninth Circuits

BRIEF OF *AMICI CURIAE* MORTGAGE BANKERS ASSOCIATION AND STATE MORTGAGE LENDING ASSOCIATIONS SUPPORTING PETITIONERS AND REVERSAL IN NOS. 16-285 AND 16-300, AND SUPPORTING RESPONDENTS AND AFFIRMANCE IN NO. 16-307

[Amici State Associations Listed Inside Front Cover]

GERMÁN A. SALAZAR
40 East Rio Salado Parkway
Suite 445
Tempe, AZ 85281

STEPHEN A. FOGDALL
Counsel of Record
ARLEIGH P. HELFER III
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2581
sfogdall@schnader.com

Attorneys for Amici Curiae

Library of Congress

Amici State Mortgage Lending Associations:

ARIZONA MORTGAGE LENDERS ASSOCIATION,
CALIFORNIA MORTGAGE BANKERS ASSOCIATION,
COLORADO MORTGAGE LENDERS ASSOCIATION,
ILLINOIS MORTGAGE BANKERS ASSOCIATION,
MORTGAGE BANKERS ASSOCIATION OF ARKANSAS,
NEW YORK MORTGAGE BANKERS ASSOCIATION,
OHIO MORTGAGE BANKERS ASSOCIATION, AND
TEXAS MORTGAGE BANKERS ASSOCIATION

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INTEREST OF *AMICI CURIAE*[1]

Amici represent the residential real estate finance industry in their respective states and across the nation. *Amici*'s members include mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, life insurance companies, Wall Street conduits and others in the mortgage lending field. *Amici* and their members seek to ensure the continued strength of the nation's residential real estate markets, to expand home ownership, and to extend access to affordable housing to all Americans.

Amici, their members, their members' employees, and home buyers generally, have a strong interest in controlling the costs and risks associated with class and collective litigation. Many of *amici*'s members are, or do significant business with, small, independent mortgage companies that typically focus exclusively on residential mortgage lending. In recent years, first-time home buyers have come to depend increasingly on such independent mortgage companies to finance the purchase of their homes.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their respective members and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), counsel for the parties have consented to the filing of the brief, and writings expressing such consent have been filed with the Clerk of the Court.

Indeed, in 2015, independent mortgage companies accounted for 50 percent of first-lien home purchase loans, up from 47 percent in 2014.[2]

Most independent mortgage companies are "owned and operated by a single individual or small number of owners whose personal net worth is fully invested in the company."[3] Many have fewer than 100 employees.[4] However, while the number of employees on the payroll at a typical independent mortgage company may be small, class and collective actions frequently include both current and former employees and the number of claimants in such an action is often multiples of the current employee pool. This fact, combined with the potential for added penalties and damage multipliers, such as the provision for liquidated damages under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), means that a class or collective action can easily threaten the existence of many independent mortgage companies. Generally, low- and moderate-income families benefit from increased availability of

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[2] Board of Governors of the Federal Reserve System, "Residential Mortgage Lending from 2004 to 2015: Evidence from the Home Mortgage Disclosure Act Data," FED. RESERVE BULL. (NOV. 2016), *available at* https://www.federalreserve.gov/pubs/bulletin/2016/pdf/2015_HMDA.pdf.

[3] Mortgage Bankers Association, "IMB Fact Sheet: The Resurgent Role of the Independent Mortgage Bank," *available at* https://www.mba.org/Documents/Comment%20Letters/14524_GAR_IMB_Flyer.pdf.

[4] *Id.*

credit, and, by the same token, such families would be harmed if independent mortgage companies were to go out of business.[5] These independent companies are a major part of the Nation's housing finance system and are essential to a robust, competitive and affordable mortgage market for consumers.[6]

Therefore, *amici* support the enforceability of class and collective action waivers of the sort that the Seventh and Ninth Circuits, and the National Labor Relations Board, erroneously have concluded constitute an unfair labor practice under section 8 of the National Labor Relations Act (NLRA), 29 U.S.C. § 158.

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[5] Many low- and moderate-income first-time home buyers purchase their homes with loans insured by the Federal Housing Administration (FHA). Larger lenders have significantly reduced their share of FHA-insured loans in recent years, so these borrowers heavily depend on independent mortgage companies for their loans. *See, e.g.*, Diana Olick, *Chase Mortgage CEO Red Flags FHA Loans*, CNBC (Sept. 21, 2015), http://www.cnbc.com/2015/09/21/chase-mortgage-ceo-red-flags-fha-loans.html; Stephen Gandel, *Is JPMorgan Really Ditching Government Homeownership Programs?*, FORTUNE (JUL 17, 2014), http://fortune.com/2014/07/17/jpmorgan-fha-lending/.

[6] *See, e.g.*, "Concentration in Mortgage Lending, Refinancing Activity and Mortgage Rates," NBER Working Paper 19156, June 2013, *available at* www.nber.org/papers/w19156 (presenting evidence that interest rates on residential mortgage loans in more concentrated mortgage lending markets are less responsive to reductions in lenders' production costs, suggesting that cost savings are passed through to borrowers less effectively in such markets); *see also infra* note 10.

SUMMARY OF THE ARGUMENT

The Fifth Circuit correctly held that class and collective action waivers in employment contracts do not violate employees' rights under the NLRA. The decisions of the Seventh and Ninth Circuits to the contrary are not well-founded.

The dispositive question in these cases is whether a class or collective action waiver in an employment contract inherently "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section [7]" of the NLRA. 29 U.S.C. § 158(a)(1). The answer to that question is no. The proposition that employees have a right under section 7 to engage in class or collective litigation is dubious at best, but even assuming section 7 applies to such activity, an employee's knowing and voluntary waiver of these procedures as a condition of employment does not automatically become an unfair labor practice. "[I]t is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated." *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965). There are ample business justifications for class and collective action waivers, particularly in conjunction with mandatory arbitration provisions, all of which have been thoroughly and convincingly articulated in decisions of this Court. Moreover, there are many good reasons why employees themselves rationally can, and do, agree to such waivers in their employment contracts. Therefore, the conclusion of the Seventh and Ninth Circuits, and the Board, that a class or collective action waiver automatically is an

unfair labor practice under section 8(a)(1) of the NLRA cannot be correct.

While the true crux of these cases is section 8(a)(1), the Seventh and Ninth Circuits, and the Board, mistakenly view the dispositive issue as whether class and collective litigation activity is "concerted activity" under section 7 of the NLRA. These tribunals erroneously reason that class and collective litigation are "concerted activities," and, therefore, any waiver of such activities by an employee must be unenforceable and, if unenforceable, then an unfair labor practice. No decision of this Court supports this conclusion. The two decisions relied on by all three of these tribunals, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), address the *remedial* powers of the Board, *given* either that an unfair labor practice has been found or that an individual contract conflicts with a collectively bargained agreement. These decisions do not address the logically prior question of whether a waiver of activity under section 7 *is* an unfair labor practice that would trigger the Board's remedial power, and they cannot be cited for the proposition that any such waiver is unenforceable.

Lastly, though unnecessary for the resolution of these cases, treating class and collective litigation as "concerted activity" is not a reasonable construction of section 7, and the Fifth Circuit was right to reject it. Class litigation under Rule 23 is in fact the opposite of concerted activity. And while collective actions arguably are "concerted," this Court's decisions make clear that there can be no

substantive right to invoke such procedures that could be protected by section 7.

ARGUMENT

I. CLASS AND COLLECTIVE ACTION WAIVERS DO NOT INTERFERE WITH, RESTRAIN OR COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER SECTION 7 OF THE NLRA.

The decisions of the Seventh and Ninth Circuits, and the Board decision that the Fifth Circuit properly refused to enforce, all rest on the premise that "contracts between employers and individual employees that stipulate away Section 7 rights necessarily interfere with employees' exercise of those rights in violation of Section 8." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016); *see also Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) (following *Lewis*); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 at 2 (2014) (concluding that "Respondent has violated Section 8(a)(1) of the [NLRA]" simply by "requiring its employees to agree to resolve all employment-related claims through individual arbitration"); *see also D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012) (reasoning that if a workplace "rule explicitly restricts activities protected by Section 7," "the rule is unlawful"). Thus, these tribunals all assume that the analysis in these cases begins and ends with whether class and collective litigation are "concerted activities" under section 7. The Court should reject this approach.

Assuming *arguendo* that class and collective litigation are, or can be, "concerted activities" as that term is used in section 7, it does not follow that a class or collective litigation waiver automatically is an unfair labor practice. The controlling test is whether "the interference with § 7 rights outweighs the business justification for the employer's action." *Textile Workers*, 380 U.S. at 269; *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 339 (1965) (Goldberg, J. concurring in the result) ("[T]he correct test for determining whether § 8(a)(1) has been violated in cases not involving an employer's antiunion motive is whether the business justification for the employer's action outweighs the interference with § 7 rights involved.").

There are many reasons why both employers and employees agree to waive recourse to class or collective litigation procedures.[7] There is nothing in the record in any of these cases to suggest that any degree of "interference," however minimal, in employees' exercise of concerted activity under section 7 outweighs the well-settled justifications for such waivers.

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[7] Such waivers typically occur in the context of mandatory individual arbitration clauses. However, the justifications for class and collective action waivers discussed in this section do not depend on being embedded in an agreement to arbitrate. The same interests in controlling risks, reducing agency costs and avoiding estoppel animate any agreement to forego class or collective procedures, whether or not the parties also agree to an arbitral forum for adjudication of an individual claim.

First, there is the obvious justification that such waivers allow the parties to avoid the potentially crippling costs of class and collective litigation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). These costs are further enhanced in the employment context by statutes that allow for a damages multiplier. One example is the FLSA, which provides not only for an award of attorney's fees but an additional award of "liquidated damages" equal to the amount of actual damages recovered. 29 U.S.C. § 216(b). While such liquidated damages are also available to a single employee proceeding individually, the exposure to the employer is far greater when magnified across its current and former workforce. For an employer "owned and operated by a single individual or small number of owners whose personal net worth is fully invested in the company,"[8] such costs can easily constitute an existential threat. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). There

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[8] IMB Fact Sheet, *supra* note 3. The Department of Labor has concluded that loan officers cannot be treated as exempt under the administrative exemption of the FLSA. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. __ (2015) (Slip Op. at 5). Moreover, the SAFE Act limits the ability of mortgage companies to utilize independent contractors for loan processing and underwriting, *see* 12 U.S.C. § 5103(b)(2). Class and collective action waivers are, in practice, the only means available to lessen the risks of employee litigation. If such waivers are unenforceable, many independent mortgage companies may simply choose to exit the market, or will be forced to do so.

is ample justification for class and collective action waivers based on these considerations of cost and risk avoidance alone. No one benefits from liability exposure so extreme that operating a business becomes unviable. Certainly, employees suffer. And in the case of the real estate finance industry, which *Amici* represent, home mortgage consumers are harmed as well.[9]

Second, far from unilaterally benefiting only the employer, an employer actually *loses* one of the central benefits of class litigation when it agrees to a waiver with employees, namely, the avoidance of multiple inconsistent judgments. *See* Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 392 (2014). Employees agreeing to such a waiver, on the other hand, avoid the risk of estoppel. Indeed, the employer, having agreed to waive class and collective litigation, may well be exposed to offensive collateral estoppel from other claimants if it

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[9] Numerous studies have analyzed the increased prices and other adverse effects of a reduction of lenders and lending capital on home mortgage borrowers. *See, e.g.*, Joshua Harris et al., "Concentration in US Mortgage Loans and the Impact of the Great Recession," University of Central Florida College of Business Administration, Working Paper 1507, available at http://realestateucf.com/wp-content/uploads/2015/10/wp-1507.pdf; Jason Allen et al., *The Effect of Mergers in Search Markets: Evidence from the Canadian Mortgage Industry*, 104 AM. ECON. REV. 3365 (2013); Herbert Baer & Larry R. Mote, *The Effects of Nationwide Banking on Concentration: Evidence from Abroad*, 9 ECON. PERSPECTIVES 3 (1985); Michael L. Marlow, *Bank Structure and Mortgage Rates: Implications for Interstate Banking*, 34 J. ECON. & BUS. 135 (1982).

unsuccessfully litigates an issue in an individual proceeding with any one employee, yet the employer cannot invoke defensive collateral estoppel against such other employees if it is successful. The benefits of this asymmetry inure only to employees, and may prove quite valuable in cases, such as those involving alleged discrimination, that in practice can be quite difficult to prove. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) ("Over the period of 1979-2006 in federal court, the plaintiff win rate [in employment discrimination] cases (15%) was much lower than for [other] cases (51%)."). Another employee, in a different proceeding, involving a different arbitrator, or a different judge, a different lawyer and better developed evidence, may well succeed in proving a claim where another employee failed. The Seventh and Ninth Circuits, and the Board, simply overlook this asymmetrical benefit that class and collective action waivers provide to employees.

Third, the costs of class litigation go beyond increased litigation expense and liability exposure for the employer. Such costs include agency costs to the claimants who necessarily cede control over the presentation of their claims to a representative who may be overincentivized to litigate issues unique to his or her own individual claim, or simply ill-positioned to litigate the case successfully. *See generally* Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165 (2013); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action*

and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. CHI. L. REV. 1 (1991). While absent class members can, of course, opt out of certain classes, such an opportunity may come years after the litigation is filed, after the issues and evidence have been shaped by others. Moreover, absent class members have no right to opt out, or indeed even to be notified, of classes seeking primarily injunctive relief. *See* FED. R. CIV. P. 23(b)(2).[10] There is no reason why employees cannot rationally choose to avoid these potential agency costs by agreeing at the outset of their employment that any claim will be brought only in an individual capacity.

Neither the NLRB in *Murphy Oil*, nor the plaintiffs in *Morris* and *Lewis*, cited any evidence to show that any "interference" with employees' section 7 rights as a result of class and collective action waivers outweighs any, let alone all, of these justifications. Thus, there is no basis in the record of these cases for the conclusion that the employers committed an unfair labor practice merely by including such a waiver in their employment contracts.

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[10] For example, an individual employee may seek injunctive relief on behalf of a class pursuant to Federal Rule 23(b)(2) in civil actions under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(g); *Chicago Teachers Union, Local No. 1 v. Bd. of Educ.*, 797 F.3d 426, 441-42 (7th Cir. 2015).

II. THIS COURT HAS NEVER SUGGESTED THAT ALL CONTRACTUAL WAIVERS OF CONCERTED ACTIVITY UNDER SECTION 7 ARE INVALID.

In addition to incorrectly supposing that any contract term waiving concerted activity under section 7 is automatically an unfair labor practice, the Seventh and Ninth Circuits, and the Board, also erroneously concluded that any waiver of concerted activity must be "invalid" or "unenforceable." *See Lewis*, 823 F.3d at 1155 ("Contracts that stipulate away employees' Section 7 rights . . . are unenforceable."); *Morris*, 834 F.3d at 983 (following *Lewis*); *Murphy Oil*, 361 N.L.R.B. No. 72 at 8 ("Because mandatory arbitration agreements . . . purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid.").

These tribunals cite as support for this proposition only two decisions of this Court, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Neither decision holds that any and all waivers of concerted activity under section 7 are invalid.

In *National Licorice*, the employer refused to bargain collectively with the union a majority of its employees had designated. When the workers went out on strike, the employer arranged for the creation of a friendly committee of employees with which it was willing to negotiate. 309 U.S. at 352-53. This committee, on the employer's instructions, convinced employees to sign individual contracts that

"relinquished the right to strike, the right to demand a closed shop or signed agreement with any union," as well as the right to arbitrate an employee's discharge. *Id.* at 354-55. This Court upheld the Board's determination that the employer had committed unfair labor practices because the contracts "were not only procured through the mediation of a company-dominated labor union, but they were the means to eliminate the Union as the collective bargaining agency of its employees." *Id.* at 539-60 (internal quotation marks omitted). This Court then concluded that "[*s*]*ince the contracts were the fruits of unfair labor practices*, stipulated for the renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board[.]" *Id.* at 361 (emphasis added).

National Licorice does not support the conclusion that a contractual provision is "invalid" or "unenforceable" merely because it involves a waiver of a particular type of "concerted activity" as that term is used in section 7. Instead, *National Licorice* recognizes that the Board's remedial power to declare a contract invalid can be exercised only "in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of [a] violation where those consequences are of a kind to thwart the purposes of the Act." *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 188, 236 (1938)). Therefore, to cite *National Licorice* for the proposition that a class or collective action waiver in an employment contract is automatically invalid merely begs the question that such waivers are, in

fact, an unfair labor practice that should trigger remedial action by the Board. Such an argument does not demonstrate, but rather assumes, the very conclusion at issue in these cases.

J.I. Case likewise does not support the conclusion that any and all waivers of concerted activity under section 7 are invalid or unenforceable. That decision concludes that if "a collective trade agreement is to serve the purpose contemplated by the [NLRA], [an] individual contract cannot be effective as a waiver of any benefit to which the employee would otherwise be entitled under the trade agreement." 321 U.S. at 338. No one has argued that any class or collective action waiver at issue in these cases seeks to waive the terms of a collectively-bargained trade agreement. *J.I. Case* is therefore inapplicable.

Thus, neither *National Licorice* nor *J.I. Case* supports the needed conclusion that any and all waivers of concerted activity under section 7 are invalid. Certainly nothing in these decisions suggests that a class or collective action waiver should be rendered invalid merely because it is deemed a waiver of "concerted activity."

Indeed, there is no reason why a putative right under section 7 to engage in class or collective litigation should be any less waivable than the right to litigate collectively in the FLSA or the Age Discrimination in Employment Act of 1967 (ADEA). This Court made clear more than twenty-five years ago in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that the collective litigation procedures in the ADEA, incorporated from the

FLSA, *see* 29 U.S.C. § 626(b), *can* be waived in favor of individual arbitration. *See* 500 U.S. at 29 ("[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention [would be] deducible from the text or legislative history" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). If the explicit provision "for the possibility of bringing a collective action" in the ADEA (and, by extension, the FLSA) is waivable, *Gilmer*, 500 U.S. at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)), then *a fortiori* there can be no nonwaivable right to engage in such litigation under section 7, which does not mention class or collective litigation (or, in fact, any type of litigation) at all.

The NLRB reasoned that the NLRA is somehow "*sui generis*" and confers a "substantive right to pursue . . . claims concertedly," while the FLSA and the ADEA "establish purely individual rights." *Murphy Oil*, 361 N.L.R.B. No. 72 at 8. This is incorrect. The NLRA cannot be the source of a purported substantive, nonwaivable right to litigate collectively because this Court held in *14 Penn Plaza LLC v. Pyett*, that "[t]he NLRA provide[s] [a] Union and [an employer] with *statutory authority* to collectively bargain for" individual dispute resolution procedures. 556 U.S. 247, 260 (2009) (emphasis added). The Court similarly concluded in *Emporium Capwell Co. v. Western Addition Community Organization* that the employer did not commit an unfair labor practice when it terminated employees

for refusing to utilize grievance procedures they alleged would address only "individual inequities" and would be "inadequate to handle a systemic grievance." 420 U.S. 50, 54-55 (1975).

If, as these decisions show, the NLRA does not prohibit a collectively-bargained agreement from waiving class or collective litigation procedures, the result should be precisely the same for individual employment contracts, contrary to the decisions at issue here. Indeed, *Gilmer* itself indicates that a waiver of class or collective litigation should be no less effective in an individual contract than it is in a collectively-bargained contract.

In sum, the consistent thrust of this Court's decisions is that the parties to an employment contract, whether in an individual or a union-represented setting, can waive resort to class and collective litigation procedures. Nothing in the NLRA says otherwise.

III. CLASS AND COLLECTIVE LITIGATION ARE NOT "CONCERTED ACTIVITY" UNDER SECTION 7.

Lastly, the Seventh and Ninth Circuits and the Board all incorrectly concluded that class and collective litigation are "concerted activity" under section 7. The sole decision of this Court these tribunals cited for this conclusion is *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). *See Lewis*, 823 F.3d at 1152; *Morris*, 834 F.3d at 981; *Murphy Oil*, 361 N.L.R.B. No. 72 at 1 n.4. Once again, this decision does not support the asserted conclusion.

First, *Eastex* addressed whether an employer committed an unfair labor practice when it prohibited the "distribut[ion] [of] a union newsletter in nonworking areas of [the employer's] property during nonworking time." 437 U.S. at 558. That question obviously has no application here.

Second, the Court merely noted in passing that "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," and cited a string of decisions by the Board in a footnote. 437 U.S. at 565-66 & n.15. The Court then immediately commented that "*[w]e do not address here the question of what may constitute 'concerted' activities in this context*." *Id.* at 566 n.15 (emphasis added).

Third, far from endorsing the notion that employees have an immutable right to "resort to" class or collective litigation procedures in a "judicial forum," the Court explicitly referenced protection "*from retaliation*" for such litigation activity. Thus, what this Court recognized in *Eastex*, at most, is that an employer violates the NLRA by *retaliating* against employees for engaging in litigation to "improve working conditions." Nothing in *Eastex* suggests that an agreement to waive class or collective litigation is itself a violation of the NLRA.

In addition to lacking support in this Court's decisions, treating class or collective litigation as "concerted activity" is in any event not a reasonable construction of section 7.

First, as to class litigation under Federal Rule of Civil Procedure 23, such litigation is not "concerted activity." Indeed, it could fairly be characterized as the opposite of concerted activity. In class action litigation, the named plaintiff represents nonparticipating parties who are, by definition, absent from the case. Moreover, the suggestion that the substantive right of "concerted activity" under Section 7 somehow encompasses a right to utilize the procedural mechanism of Rule 23 is, at best, quite puzzling. Does the right of "concerted activity" mean that the named plaintiff and unnamed putative class members have the right to *seek* class treatment, or that they in fact have a substantive right to have the motion for class certification granted? The latter cannot be correct, and would foreclose the employer from opposing class certification where there are legitimate grounds to do so. The former also cannot be right. Prior to class certification, the named plaintiff is really only proceeding in an individual capacity. Thus, the position under review amounts to saying that an individual named plaintiff has the substantive right to *ask* a court to confer on him or her the ability to litigate in a representative capacity. Again, that is a very odd notion of "concerted activity," and not within the plain meaning of the phrase.

Second, as to collective litigation procedures such as those available under the FLSA or the ADEA, such litigation arguably *is* "concerted." However, construing such litigation as section 7 "concerted activity" would, as in the case of class litigation under Rule 23, convert a procedural mechanism into a substantive right. This Court has made clear that

"a party does not forego . . . substantive rights" by agreeing to an individual process for adjudicating disputes. *Gilmer*, 500 U.S. at 26. Thus, there can be no substantive right to invoke collective litigation procedures and, by definition, no such entitlement in the substantive rights set forth under section 7.

Nor is there any reason to treat class and collective litigation as "concerted activity" out of deference to the Board. The Board first announced this interpretation of section 7 in 2012, *see D.R. Horton*, 357 N.L.R.B. at 2277, after decades of jurisprudence in this Court, in the Courts of Appeals, and in the Board's own decisions, that contained no hint of such a construction. The Board's interpretation was properly rejected by the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Nevertheless, the Board adhered to its interpretation in the case under review from the Fifth Circuit here. Effectively, the Board seeks to undo not only the Fifth Circuit's prior ruling in *D.R. Horton* but this Court's numerous decisions upholding individual arbitration clauses and grievance procedures by announcing a newly invented construction of section 7 and then claiming that this construction cannot be challenged out of deference to its authority to construe the NLRA. The Board is not entitled to such deference in these circumstances.

CONCLUSION

For all these reasons, the Fifth Circuit should be affirmed and the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

GERMÁN A. SALAZAR
40 East Rio Salado Parkway
Suite 445
Tempe, AZ 85281

STEPHEN A. FOGDALL
Counsel of Record
ARLEIGH P. HELFER III
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market St., Suite 3600
Philadelphia, PA 19103
(215) 751-2581
sfogdall@schnader.com

Attorneys for Amici Curiae

RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

Supreme Court, U.S.
FILED
AUG 16 2017
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IMPACT FUND, AND 30 CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
SAMUEL SPITAL
RAYMOND AUDAIN
Counsel of Record
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
raudain@naacpldf.org

JOCELYN D. LARKIN
LINDSAY NAKO
IMPACT FUND
125 University Avenue
Suite 102
Berkeley, CA 94710
(510) 845-3473

August 16, 2017

COTY MONTAG
KYLE BARRY
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
(202) 682-1300

JOSEPH M. SELLERS
CHRISTINE WEBBER
COHEN MILSTEIN SELLERS
& TOLL, PLLC
1100 New York Avenue NW,
5th Floor
Washington, DC 20005
(202) 408-4600

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INTERESTS OF *AMICI CURIAE*[1]

This brief is submitted by the NAACP Legal Defense and Educational Fund, Inc., the Impact Fund, and 30 other non-profit civil rights and legal advocacy organizations.

The **NAACP Legal Defense and Educational Fund, Inc.** (LDF) is a non-profit legal organization that, for more than seven decades, has fought to achieve racial justice and ensure that America fulfills its promise of equality for all. In this Court and other federal and state courts, LDF has litigated numerous class actions, which are particularly effective in facilitating concerted action to secure systemic change. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). LDF has also appeared as a party and as an *amicus* before this Court in several cases involving arbitration issues. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

The **Impact Fund** is a non-profit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in numerous civil-rights class actions, including cases challenging employment discrimination, lack of access for persons with disabilities, and violations of fair housing laws.

Additional *amici* are listed in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

American democracy depends upon our unwavering commitment to equal opportunity. Federal labor law honors that commitment by guaranteeing employees the right to challenge workplace discrimination through concerted activity, including picketing, striking, and group adjudication of workplace rights. Yet mandatory pre-dispute arbitration agreements, which have become increasingly prevalent in the American workplace, now commonly prohibit employees from joining together in *any* combination and in *any* legal forum to vindicate their right to be free from workplace discrimination, and other core statutory rights.[2] By barring every imaginable form of group legal challenge

[2] *Amici*'s arguments directly relate to the arbitration provisions at issue in *NLRB v. Murphy Oil*, No. 16-307 (5th Cir.) and *Ernst & Young LLP v. Morris*, No. 16-300 (9th Cir.). The arbitration provision in *Epic Systems v. Lewis*, No. 16-285 (7th Cir.) excludes "claims alleging discrimination, harassment, or retaliation" from its coverage. *Epic Systems v. Lewis*, Petition at 32a.

to an employer's unlawful workplace practices – from simple joinder to consolidation of claims to collective and class actions – these contractual prohibitions pose a substantial threat to Congress' longstanding goal of eradicating discrimination in the American workplace. Specifically, workers will be precluded from using certain core civil rights legal theories that have been crucial for securing equal opportunity in the workplace. For civil rights, the consequences of permitting unrestrained and ubiquitous use of arbitration clauses in individual employment agreements will be profound.

"Civil rights and class actions have an historic partnership." Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 577 (1997). Landmark class actions and other forms of group litigation have long been essential components of our nation's slow but deliberate progress toward a "more perfect Union." This Court's 1954 decision in *Brown v. Board of Education* is but one example of how concerted action has been the foundation for promoting equal opportunity for all Americans. 347 U.S. 483 (1954). Civil rights concerted actions have been indispensable in reducing discrimination in almost every sphere of American society. When a plaintiff brings a class action under the civil rights laws, "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered the highest priority." *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 400-02 (1968) (successfully enjoining discrimination against African Americans at a South Carolina restaurant chain).

Concerted actions remain essential to combat persistent discrimination. *See* Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (hereinafter "Carter, *Federal Rules*") (noting the "special dependence" of civil rights litigation on the device of the class action). Since the passage of the Civil Rights Act of 1964, many of the most significant employment discrimination cases have been brought as concerted actions, and – with few exceptions – could not have been brought or would not have achieved successful results as individual actions. Concerted actions can remedy civil rights violations in circumstances where workers are unlikely to proceed alone, for lack of resources or because of well-documented fear of retaliation. In the employment context, concerted legal actions also serve broader public interests by remedying and deterring civil rights violations and dismantling systemic discrimination in the workplace.

Discrimination claims pursued in concert have enabled workers to expose institution-wide discrimination and have resulted in comprehensive remedial orders that brought into legal compliance the employment practices of some of our country's leading corporations, including Abercrombie & Fitch, Coca-Cola, Comcast, Eastman Kodak, FedEx, Morgan Stanley, Novartis, Sodexho Marriott Services, Sprint, Wal-Mart, and Xerox.[3]

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[3] *See, e.g.*, Order, *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass. May 16, 2017), ECF No. 83 (approving class

The importance of concerted action in the employment context has long been a cornerstone of federal labor law as a matter of both principle and practice. As this Court explained more than 80 years ago in *NLRB*

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settlement on behalf of 1200 current and former employees who were denied spousal health benefits for their same sex spouses); Order and Judgment, *Brand v. Comcast Corp.*, No. 11-cv-8471 (N.D. Ill. June 15, 2016), ECF No. 169 (approving class settlement for 385 African-American technicians alleging a hostile work environment); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (following trial of class gender and pregnancy discrimination claims on behalf of 6,200 female pharmaceutical sales representatives, settlement approved with detailed programmatic relief and $152 million settlement fund); Stip. & Order, *Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010), ECF Nos. 350, 27 (approving class settlement on behalf of over 3,000 current and former African-American employees); *Curtis-Bauer v. Morgan Stanley & Co.*, No. 3:06-cv-3903, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (approving class settlement on behalf of over 1,300 African-American and Latino financial advisors); *Warren v. Xerox Corp.*, No. 1:01-cv-2909, 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (approving class settlement on behalf of nearly 1,500 African-American sales representatives); *Williams v. Sprint/United Mgmt. Co.*, No. 03-2200-JWL, 2007 WL 2694029 (D. Kan. Sept. 11, 2007) (approving settlement of age discrimination collective action for 1700 workers laid off as a result of company's force ranking system); Order, *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878 (N.D. Cal. Aug. 14, 2007), ECF Nos. 780, 324 (approving class settlement on behalf of 20,000 African-American and Latino employees); Consent Decree, *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:03-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005), ECF Nos. 141, 16, 20 (approving consent decree settling claims of systemic discrimination against Latino, African-American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African-American employees).

v. Jones & Laughlin Steel Corp., a single employee "was helpless in dealing with an employer . . . he was dependent ordinarily on his daily wage for the maintenance of himself and his family; . . . if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment." 301 U.S. 1, 33 (1937). In enacting § 7 of the Nat'l Labor Relations Act, 29 U.S.C.A. §§ 151 *et seq.*, and § 2 of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101 *et seq.*, before that, Congress took direct steps to help equalize the bargaining power of employers and their employees by guaranteeing employees the right to band together in confronting an employer. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 834 (1984). This statutorily protected right to proceed in concert furthers those same goals by ensuring meaningful access to a neutral dispute resolution process that can provide a complete and effective remedy for unlawful employer conduct directed at similarly situated employees. Employment contracts that prohibit concerted legal actions destroy that equilibrium and hazard America's hard-won progress towards equality.

Forcing workers to proceed alone creates unique dangers for civil rights enforcement. Such restrictions effectively foreclose the use of two crucial methods for proving employment discrimination: disparate impact and pattern-or-practice theories. Restrictions on concerted actions also limit the availability of systemic injunctions, a tool that has been critical to the eradication of discrimination in the workplace. If employers

can preclude workers from acting together in every forum, they can – and will – effectively extinguish the civil rights claims of the most vulnerable members of the workforce.

ARGUMENT

I. CONCERTED ACTIONS HAVE HELPED TO ENSURE OUR NATION'S PROGRESS TOWARD EQUAL EMPLOYMENT OPPORTUNITY.

For decades, as both this Court and Congress have recognized, concerted actions in federal court have spurred progress toward equal opportunity and advanced our federal antidiscrimination laws' broad remedial "purpose[] . . . of eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 405-06 (1975). This progress would not have occurred if, instead of banding together to pursue claims in open court, employees were forced into individual, confidential dispute-resolution proceedings.

Concerted actions have been instrumental to the development of employment discrimination jurisprudence. For example, the transformative decision of *Griggs v. Duke Power Co.* – which established that Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000(e) *et seq.*, does not tolerate facially-neutral employment practices that operate as discriminatory barriers to employment – was brought as a class action

by a group of African-American power plant employees. 401 U.S. 424, 426 (1971). Similarly, this Court's decision in *Albemarle Paper* – a class case challenging a racially discriminatory seniority system and employment testing – established a presumption that backpay should be awarded in employment discrimination cases; that holding created a powerful economic incentive for employers to comply with Title VII. 422 U.S. at 405. These cases and others would not have been possible if forced arbitration clauses bound the plaintiff employees.

Concerted actions have also diversified the American workplace by successfully challenging a wide range of discriminatory employment rules and practices, many based on outdated stereotypes. Such cases have established that:

- Women cannot be categorically excluded from jobs that may harm their reproductive capacity. *Int'l Union, United Auto. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
- Flight engineers cannot be forced to retire at age 60. *W. Air Lines v. Criswell*, 472 U.S. 400 (1985).
- Men can apply to work as flight attendants. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981).

- Women cannot be excluded from prison guard jobs by arbitrary height and weight requirements. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).[4]

Other examples of concerted legal action similarly illustrate the power of such cases as a mechanism for ending workplace discrimination. In *McClain v. Lufkin Industries, Inc.*, the Fifth Circuit affirmed the district court's holding that a large Texas manufacturing plant's "practice of delegating subjective decision-making authority to its white managers with respect to . . . promotions resulted in a disparate impact on [a class of over 700] black employees in violation of Title VII." 519 F.3d 264, 272 (5th Cir. 2008). Among the district court's findings was that, because of the company's practices, "white employees ha[d] a significant advantage in gaining the skills and abilities needed to qualify them for promotion . . . [whereas] Black employees [were] more likely to be placed in dead-end positions and left to seek training on their own." *McClain v. Lufkin Indus.*, No. 9:97-cv-63, 2005 U.S. Dist. LEXIS 42545, at *32-33 (E.D. Tex. Jan. 13, 2005), *aff'd in relevant part*, 519 F.3d 264 (5th Cir. 2008). Similarly, in *Haynes v. Shoney's, Inc.*, the district court certified a class and ultimately issued a ruling that remedied "an overt policy of blatant racial discrimination and retaliation" at the Shoney's restaurant chain that was "developed and directed" by "top Shoney's

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[4] *Amici*'s Appendix B lists 118 concerted legal actions that have enforced civil rights protections in the workplace.

management" and "implemented by all-white supervisory and management personnel." No. 3:89-cv-30093, 1992 WL 752127, at *2 (N.D. Fla. June 22, 1992); *see also Haynes v. Shoney's, Inc.*, No. 3:89-cv-30093, 1993 WL 19915, at *6-7 (N.D. Fla. Jan. 25, 1993) (approving consent decree requiring, *inter alia*, $105 million in relief to class members and significant corporation-wide reforms). As this Court has explained, "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs." *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

Consistent with these cases, Congress has recognized that concerted actions are integral to the enforcement of civil rights laws. In 1972, when Title VII was amended by the Equal Employment Opportunity Act, proposals to abolish class actions or to restrict their scope in Title VII cases were rejected. As the Senate Report stated: "The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972). Both the Equal Pay Act, 29 U.S.C.A. § 206(d), and the Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 *et seq.*, incorporate the enforcement provisions of 29 U.S.C.A. § 216(b), which expressly authorize "[a]n action to . . . be maintained . . . by any one or more employees for and

in behalf of himself or themselves and other employees similarly situated." This Court has recognized that in "[t]he ADEA, through incorporation of § 216(b) [of the FLSA] . . . Congress has stated its policy that . . . plaintiffs should have the opportunity to proceed collectively." *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

II. CONCERTED ACTIONS ARE UNIQUELY EFFECTIVE IN REMEDYING AND DETERRING SYSTEMIC EMPLOYMENT DISCRIMINATION.

A. Concerted Actions Promote Employee Collaboration.

For individuals who have experienced discrimination and other civil rights violations, "association for litigation may be the most effective form of political association." *NAACP v. Button*, 371 U.S. 415, 431 (1963); *accord In re Primus*, 436 U.S. 412, 423-26 (1978). For example, a sense of shared commitment among African-American workers at Duke Power in North Carolina helped to catalyze the class action that led to this Court's landmark decision in *Griggs*. 401 U.S. at 431; *see also* Robert Samuel Smith, *Race, Labor & Civil Rights: Griggs versus Duke Power and the Struggle for Equal Employment Opportunity* 84-90, 113, 177-81 (David Goldfield ed., La. State Univ. Press 2008).

The ability of workers to share their experiences with one another and take concerted legal action has also helped to facilitate the eradication of hostile and

unlawful harassment in some workplaces. As this Court has observed, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at *all* [*of*] *the circumstances.*" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (emphasis added). This inquiry may be both complex and subtle because "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998).

As such, victims of harassment frequently join with their co-workers to challenge abusive environments in multi-plaintiff, collective, or class actions.[5]

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[5] *See, e.g.*, *Ellis v. Houston*, 742 F.3d 307 (8th Cir. 2014) (five African-American correctional officers challenged pattern of racial harassment by supervisor in Nebraska penitentiary); *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. 2011) (six African-American steel production plant workers unlawfully subjected to racially hostile work environment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-15 (8th Cir. 1988) (three female "flag persons" proved sexually hostile environment perpetrated by male road construction crew); *Brand v. Comcast Corp.*, 302 F.R.D. 201, 207 (N.D. Ill. 2014) (challenge to racially hostile environment in telecommunications facility); *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007) (female sales employees alleged hostile work environment and other gender based claims against national pharmaceutical company); *Smith v. Nike Retail Servs.*, 234 F.R.D. 648 (N.D. Ill. 2006) (18 African-American retail workers alleged racially hostile work environment on behalf of class employed in Chicago area stores); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 879-87 (D. Minn. 1993) (class of female workers in taconite mining facility established that "sexualized" work environment was objectively hostile); *Sellars v. CRST Expedited, Inc.*, No. C15-117, 2017

The mutually corroborating testimony of co-workers can be critical to plaintiffs' ability to meet their burden of proving that the alleged harassing conduct was not isolated or sporadic,[6] can illuminate the context of such behavior,[7] and can establish why the conduct should be deemed objectively harassing to a reasonable person.[8] For example, if a manager regularly propositions female subordinates behind closed doors, joint legal action can empower victims to bring the harassing conduct to light and overcome a "he said/she said" defense that is often fatal in individual actions.

When workers act together to expose and prove discrimination or harassment, their joint efforts create

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WL 1193730 (N.D. Iowa 2017) (group of female truck driver trainees challenging failure to prevent sexual harassment by male lead drivers during long-haul road trips).

[6] *Ellis*, 742 F.3d at 322 ("evidence offered both by the black officers and by other witnesses indicated that racist comments were made without objection in a group setting on a near daily basis"); *Jenson*, 824 F. Supp. at 879 n.78 ("Numerous witnesses testified about the presence of visual, verbal and physical references to sex and sexual relations. . . . the uniformity with which they discussed the sexualized nature of the work place convinces the Court that the work place was sexualized").

[7] *Ellis*, 742 F.3d at 320 (underscoring the importance of "context" in evaluating the objective severity of daily racial remarks in case brought by five African-American corrections officers).

[8] *Jackson v. Quanex Corp.*, 191 F.3d 647, 661 (6th Cir. 1999) (reversing directed verdict for employer where court excluded testimony of African-American co-workers that "certainly mattered" as to whether the workplace was "objectively hostile"); *Sandoval v. Am. Bldg. Maint. Indus.*, 578 F.3d 787, 802 (8th Cir. 2009) (evidence of other incidents of harassment is "highly probative of the type of workplace environment [plaintiff] was subjected to").

economies of scale. This Court has repeatedly recognized the importance of concerted actions in providing legal redress for inequities that may be too time- and resource-intensive to realistically challenge through isolated individual claims. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Hoffman-La Roche*, 493 U.S. at 170; *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Without the right to challenge discrimination through concerted legal action, many meritorious civil rights claims will never be pursued at all, for reasons unrelated to their merits. Especially for low-wage workers, the amount of potential recovery in an employment case is often so small, and the costs of litigation so high, that pursuing an individual claim would be economically irrational. *See Jarvaise v. Rand Corp.*, 212 F.R.D. 1, 4 (D.D.C. 2002) (noting in suit alleging sex discrimination in pay, "[w]ithout class certification, there could be . . . a significant number of individuals deprived of their day in court because they are otherwise unable to afford independent representation."). Many workers also lack knowledge about the full range of protections afforded by anti-discrimination laws or which particular employer practices or policies run afoul of those laws, and cannot even begin to address any violation of those rights absent notice from co-workers or a court that a group legal challenge has been initiated. *See Hoffmann-La Roche Inc.*, 493 U.S. at 170 ("These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate").

Concerted actions, by contrast, allow multiple plaintiffs to share the costs and burdens of litigation, which is often key to obtaining redress. *See, e.g., Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 997 (5th Cir. 1984) (reversing judgment against a discrimination plaintiff to permit broad discovery in support of a class certification motion). Such actions can also trigger a broader inquiry into discrimination, yielding company-wide evidence that an individual plaintiff is less likely to uncover. *See* Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 Ohio N.U. L. Rev. 621, 631 (2011).

B. Concerted Actions Allay Fears and Reduce the Risks of Retaliation.

Concerted actions also help to ameliorate legitimate fears of retaliation, which would otherwise discourage individuals from proceeding alone. Reflecting on his experience as a civil rights litigator, Judge Robert Carter observed that in cases "seeking to vindicate novel rights in the face of majoritarian hostility, the very ability to proceed required the institution of a class action" because a "lone plaintiff" may be "extremely vulnerable to the pressure of intimidation." Carter, *Federal Rules*, at 2186; *see also Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding class certification requirements satisfied where "class members still employed by the [defendant] might be reluctant to file individually for fear of workplace retaliation").

Unlike plaintiffs in most consumer or securities cases, workers who press claims for employment discrimination are uniquely vulnerable to retaliation. Consequently, many victims of employment discrimination are deterred from vindicating their rights, for fear of losing the weekly paycheck by which they provide for their families. "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 73 (2006). While the law provides a potential remedy for those who can ultimately prove retaliation, the prospect of compensation sometime in the future is cold comfort when an employee is suspended or fired for asserting his or her rights. *See id.* ("[A]n indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay."). Moreover, retaliation in the workplace can be subtle, indirect, and difficult if not impossible to prove, making the threat of adverse consequences all the more chilling. Because of their economic vulnerability, low-wage workers face significant obstacles when they seek to vindicate their rights, including particularly pernicious forms of retaliation.

Concerted legal action permits workers to overcome these fears and stand together to assert their rights. "Employment discrimination suits seeking injunctive relief are frequently managed as class actions due to distinctive difficulties with joinder. Prospective plaintiffs may refuse to identify themselves for fear of harassment or retaliation by the employer." *McClain v.*

Lufkin Indus., Inc., 187 F.R.D. 267, 278 (E.D. Tex. 1999). A worker who must stand alone to confront her employer and challenge a violation of her civil rights will be far less likely to do so if she must bear that risk alone. *See, e.g.*, *Mullen*, 186 F.3d at 625 (Casino workers "might be unwilling to sue individually or join a suit for fear of retaliation at their jobs.").

C. Concerted Actions Ensure Corporate Transparency and Promote Accountability.

Employers are less likely to be held accountable for discrimination when challenged on an individual basis, especially when strict confidentiality provisions are in place, as they are in many employment arbitration agreements. *See* Malveaux, *supra*, at 631. The resulting harms to victimized employees and to the congressional purposes and policies underlying federal workplace protections are enormous. Individual employees are often unaware when their rights are violated, either because their employer has successfully concealed the discrimination or because it occurs in patterns that are not recognizable to individual employees. For example, discrimination that results in pay disparities is often difficult to detect because pay decisions are made confidentially and many employers discourage or outright prohibit employees from discussing salary. *See* U.S. Dep't of Labor, Women's Bureau, Fact Sheet, Pay Secrecy, 1 (Aug. 2014), https://www.dol.gov/wb/media/pay_secrecy.pdf ("In 2010, nearly half of all workers nationally reported that they were

either contractually forbidden or strongly discouraged from discussing their pay with their colleagues."). Confidential arbitration decisions also cannot provide guidance to law-abiding employers who want to comply with civil rights laws in their personnel decisions. *See* AAA Employment Arbitration Rules and Mediation Procedures, Rule 23 (2009) ("The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.").[9]

The exposure that accompanies concerted legal action also helps to deter future wrongdoing by signaling to the market that employment discrimination is harmful economically and reputationally to the corporate brand. A federal district court recognized these benefits when it approved an "imaginative" nationwide class settlement to resolve allegations that Texaco pervasively discriminated against African-American

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[9] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31-32 (1991), a case brought by older workers under the ADEA, the Court considered whether arbitration would lead to "a stifling of the development of the law" under circumstances far different from those here. There, the rules at issue allowed for collective proceedings and *required* all arbitration awards to be in writing and made public, with a summary of the award and issues in controversy. *Id.* But in the consolidated cases here, one of the three arbitration clauses requires that arbitration proceedings, "including any award made, shall be confidential[.]" *Ernst & Young LLP v. Morris*, No. 16-300, JA 46. The other two invoke the American Arbitration Association's rules, for employment arbitration, quoted above, which mandate confidentiality. *NLRB v. Murphy Oil*, No. 16-307, JA at 8, *Epic Systems Corp. v. Lewis*, No. 16-285, Petition at 33a.

employees and concealed evidence pertinent to the litigation. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 189-93, 198 (S.D.N.Y. 1997). The court noted that the case "captured national attention" and "may well have important ameliorative impact not only at Texaco but in the corporate context as a whole." *Id.* at 189, 197-98.

III. MOST WORKERS CANNOT USE KEY CIVIL RIGHTS LEGAL THEORIES OR OBTAIN BROAD INJUNCTIVE RELIEF IN THEIR INDIVIDUAL ACTIONS.

Concerted actions are essential to remedying employment discrimination, and much important civil rights jurisprudence has developed in the context of this group paradigm. Individualized actions, by contrast, are poorly equipped to address pervasive and entrenched discrimination. They preclude workers from using three major tools for identifying and remedying workplace discrimination.

A. Disparate Impact Theory

Disparate impact theory – a cornerstone of equal employment jurisprudence for more than four decades – targets facially neutral workplace practices that disproportionately burden members of a protected group without legal justification. In addition to Title VII, employment discrimination claims under the Americans

with Disabilities Act, *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), and the Age Discrimination in Employment Act, *Smith v. City of Jackson*, 544 U.S. 228 (2005), may also use disparate impact analysis.

Disparate impact cases have played a powerful role in making employment opportunities available to members of groups unjustifiably excluded by archaic employment rules, tests unrelated to job performance, and subjective criteria used by public and private employers.[10] The disparate impact theory of discrimination continues to be of vital importance today.[11]

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[10] *See, e.g.*, *Dothard*, 433 U.S. at 331-32 (striking down Alabama's height and weight requirements for correctional counselors that disproportionately excluded women and were not job-related); *Albemarle Paper Co.*, 422 U.S. at 405 (successful challenge to job seniority rules and employment tests that locked African-American workers into lower paying positions in paper mill); *Rowe v. GM Corp.*, 457 F.2d 348 (5th Cir. 1972) (court enjoined subjective transfer/promotion system at auto assembly plant which resulted in disparate impact on African-American employees).

[11] *See, e.g.*, *Ernst v. City of Chicago*, 837 F.3d 788, 805 (7th Cir. 2016) (female applicants for paramedic positions proved that physical abilities test had a disparate impact that was not job related); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117 (4th Cir. 2013) (female store managers may properly challenge subjective compensation policy under disparate impact theory); *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014) (challenge by Black and Latino applicants to use of arrest records as screening device for temporary U.S. census positions); *McReynolds v. Merrill Lynch*, 672 F.3d 482, 491 (7th Cir. 2012) (disparate impact challenge to account distribution and teaming policies that adversely affected African-American brokers); *United States v. City of New York*, 637

Disparate impact claims are "typically" brought as class actions, 1 Lindemann, Grossman & Weirich, Employment Discrimination Law 3-3 (5th ed. 2012) (hereinafter "Lindemann, Empl. Discrim. Law"), or by groups of workers, *see, e.g.*, *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012); *Maldonado v. City of Altus*, 433 F.3d 1294, 1303-07 (10th Cir. 2006). Disparate impact claims for a single individual are very rare, and are rarely successful.[12] As the Tenth Circuit long ago observed, "discriminatory impact cannot be established where you have just one isolated decision." *Coe v. Yellow Freight Sys.*, 646 F.2d 444, 451 (10th Cir. 1981).

F. Supp. 2d 77, 131-32 (E.D.N.Y. 2009) (invalidating fire department's written examinations that had an unjustified disparate impact on African-American and Latino applicants).

[12] *See, e.g.*, *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1041 (2d Cir. 1993) (female plaintiff's comparison using seven male employees insufficient to meet statistical burden to establish disparate impact); *Young v. Covington & Burling LLP*, 846 F. Supp. 2d 141, 160-61 (D.D.C. 2012) (plaintiff's statistical evidence failed to demonstrate that law firm promotion policy had a disparate impact on African Americans); *Hankins v. Best Buy Co.*, No. 10-cv-4508, 2011 WL 6016233, at *8 (N.D. Ill. Dec. 2, 2011) (individual disparate impact claim dismissed because the "complaint must also allege that individuals other than the plaintiff were affected by the facially neutral policy"); *Coopersmith v. Roudebush*, 517 F.2d 818, 820-21 (D.C. Cir. 1975) (single plaintiff failed to demonstrate that legal experience requirement had disparate impact). *But see Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 n.26 (5th Cir. 1999) ("In the ADA context, a plaintiff may satisfy the second prong of his prima facie case by demonstrating an adverse impact on himself rather than on an entire group.").

The evidence in disparate impact cases "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). This Court has underscored the demanding nature of the necessary statistical proof, as well as the need to establish a causal link between the disparity and the challenged employment practice. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-59 (1989); *Watson*, 487 U.S. at 993-99; *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 101-02 (2008).

For this reason, broad discovery of workforce data is essential for plaintiffs to meet their burden in a disparate impact case, particularly since pertinent information is generally within the exclusive control of the defendant. This Court has recognized this need, and has underscored that "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." *Wards Cove*, 490 U.S. at 657 (addressing the suggestion that the Title VII disparate impact causation requirement was "unduly burdensome"). The scope of discovery necessary to generate these statistical analyses is generally not available in individual actions. *See, e.g.*, *Woodward v. Emulex Corp.*, 714 F.3d 632, 636 (1st Cir. 2013) (in individual age discrimination action, no abuse of discretion when discovery limited to 21 sales workers); *see generally* 2 Lindemann, Empl. Discrim. Law at 24-25 ("Different discovery rules may apply in class actions, as a class suit by definition involves persons and circumstances beyond the particular named plaintiff.").

Even where discovery is available in an individual proceeding, when analyzing a single employment decision there is a significant risk that the "relevant data base [may be] too small to permit any meaningful statistical analysis." *Watson*, 487 U.S. at 1000; *see, e.g.*, *Tyler v. Univ. of Ark. Bd. of Trs.*, 628 F.3d 980, 990 (8th Cir. 2011) (sample of six job applicants too small for meaningful statistical analysis); 2 Lindemann, *supra*, at 35-75 ("Courts have recognized that statistical evidence often is unreliable when the sample size is small."). Put simply, individuals who are forced to proceed alone will have a hard time making out a disparate impact claim. *See* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 Hofstra Lab. & Emp. L.J. 433, 443-44 (2012) ("Although disparate impact claims are available to individual plaintiffs, such claims are rarely successful. This is largely a function of the evidentiary rigors of a disparate impact claim, consisting of aggregate statistics showing that an employer's facially neutral practices had a disproportionately adverse impact on a protected group.").

B. Pattern or Practice Theory

Individualized adjudication is similarly not compatible with the pattern-or-practice method of proof. A distinctive feature of employment discrimination jurisprudence, pattern-or-practice claims have been recognized as an essential tool in combating pervasive workplace discrimination and providing "make whole

relief" to victims. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (observing the necessity of pattern-or-practice litigation to address discrimination that is "repeated, routine or of a generalized nature"); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (noting that the pattern-or-practice model is "essential if the purposes of Title VII [are] to be achieved"). This Court reaffirmed the availability of the *Teamsters* pattern-or-practice method of proof in class action cases in *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 352 n.7 (2011).

Pattern-or-practice claims are grounded in this Court's recognition that "[i]n many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." *Teamsters*, 431 U.S. at 339-40 n.20 (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971)). But numerous circuits have held that the pattern-or-practice method of proof is not available in individual or multi-plaintiff cases. *See, e.g., Chin*, 685 F.3d 135; *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 967-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565 (6th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

The pattern-or-practice framework not only allows, but requires, courts to step back and assess the universe of an employer's actions as a whole. Only through this broader lens can widespread discrimination be uncovered and evaluated. In individual

adjudication, however, workers are less able to avail themselves of this tool.

C. Systemic Injunctive Relief

Systemic injunctive relief – another critical tool for dismantling discriminatory conditions – is also ordinarily unavailable in individual cases. Federal Rule of Civil Procedure 23 provides the vehicle for a generally applicable and efficient class-wide remedy, resulting in cessation of the discriminatory practice and, where appropriate, additional equitable remedies for class members. However, absent class certification, courts often refrain from granting relief that extends beyond the harms suffered by the individual plaintiffs.

This Court has held that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified."); *Hernandez v. Reno*, 91 F.3d 776, 781 (5th Cir. 1996) (injunction can apply only to the named plaintiff until class is certified); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 733 (5th Cir. 1977) (in ADEA case for individual termination, "nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute").

In *Lowery v. Circuit City Stores, Inc.*, a unanimous jury found that Circuit City had engaged in a pattern or practice of racial discrimination, and the district court ordered broad injunctive relief, including the creation of new procedures to ensure nondiscriminatory promotion. 158 F.3d at 761. However, on appeal, the Fourth Circuit held that because the district court had declined to certify a class, the plaintiffs could not use evidence of systematic discrimination under the *Teamsters* framework to prove instances of individual discrimination. *Id.* (citing *Teamsters*, 431 U.S. at 324). Accordingly, the court granted relief to one of the named plaintiffs, but vacated all other equitable relief, including an injunction requiring the employer to promote employees "without regard to their race." *Lowery*, 158 F.3d at 766-67. The lack of class certification forced the court to disregard a finding of pervasive discrimination, thwarting the plaintiffs' effort to fully vindicate the purposes of Title VII. *Id.* at 766.

* * *

Concerted actions in federal courts have established key legal precedents essential to our nation's progress toward equal opportunity. These precedents give full meaning to our antidiscrimination statutes and provide clarity for employers who want to comply with the law. As this Court has recognized, the legislative purposes that animate our civil rights statutes require "the principled application of standards consistent with those purposes," *Albemarle*, 422 U.S. at 417, and "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results

for breaches of duty in situations that cannot be differentiated in policy,'" *id.* (quoting *Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970)). Allowing mandatory individual arbitration to displace the federally-guaranteed right to concerted legal action would create just such a regime. It would also deprive most employees of the kind of evidence that is necessary to challenge widespread, institutional discrimination and would make it difficult or impossible to secure broad-based injunctive relief. Under such a piecemeal regime, workers would be far less effective in removing arbitrary and invidious discrimination from the workplace.

CONCLUSION

For the foregoing reasons, the NLRB's and employees' positions should be accepted and the rulings of the Seventh and Ninth Circuits should be affirmed, while the Fifth Circuit's ruling should be reversed.

Respectfully submitted,

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
SAMUEL SPITAL
RAYMOND AUDAIN
Counsel of Record
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
raudain@naacpldf.org

JOCELYN D. LARKIN
LINDSAY NAKO
IMPACT FUND
125 University Avenue
Suite 102
Berkeley, CA 94710
(510) 845-3473

COTY MONTAG
KYLE BARRY
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW
Washington, DC 20005
(202) 682-1300

JOSEPH M. SELLERS
CHRISTINE WEBBER
COHEN MILSTEIN SELLERS & TOLL, PLLC
1100 New York Avenue NW, 5th Floor
Washington, DC 20005
(202) 408-4600

August 16, 2017

APPENDIX A
LIST OF ADDITIONAL AMICI

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect the financial security, health, and well-being of older persons. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals age fifty and older secure the essentials. AARP and AARP Foundation combat age and disability-based employment discrimination against older workers, including through participation as amici curiae in state and federal courts. *See e.g.*, *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036 (2016); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *Smith v. City of Jackson*, 544 U.S. 228 (2005).

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the American Civil Liberties Union has appeared in numerous cases before this Court, both as counsel representing parties and as amicus curiae. The ACLU and its state affiliates advance the cause of civil liberties and civil rights through advocacy and litigation, including class action litigation, lawsuits on behalf of multiple plaintiffs, and other collective legal actions. The ACLU has served and is

currently serving as counsel in numerous class action lawsuits that have been critical to obtaining redress for constitutional violations and ensuring that federal and state laws and government policies comport with the Constitution.

Asian Americans Advancing Justice – Asian Law Caucus (ALC) was founded in 1972 with a mission to promote, advance, and represent the legal and civil rights of Asian and Pacific Islanders, with a particular focus on low-income members of those communities. ALC is part of a national affiliation of Asian American civil rights groups, with offices in Los Angeles, Chicago, Washington DC, and Atlanta. ALC's advocacy includes legal counseling, direct services, and class-action litigation for low-wage immigrant workers facing a wide range of workplace issues, including race and national origin discrimination, retaliation, and wage and hour problems. ALC also regularly provides representation for workers organizing collectively to change and improve their workplace conditions.

Asian Americans Advancing Justice – Los Angeles (Advancing Justice-LA) is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Advancing Justice-LA serves more than 15,000 individuals every year, including Asian Americans and NHPIs who lack effective access to the courts. Through direct services, impact litigation, policy advocacy and capacity building, Advancing Justice-LA focuses on vulnerable members of Asian American and NHPI communities, while also building a strong voice

for civil rights and social justice. Advancing Justice-LA has a long history of working to ensure that members of our communities have effective access to courts. We have represented vulnerable members of our communities in federal courts on a broad range of issues, including language rights and language access, workers' rights, consumer protection, education rights, housing rights, voting rights, health care, and public benefits, among others.

The **California Women's Law Center (CWLC)** is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. CWLC works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC acknowledges the importance of class action litigation to effecting widespread change, and has acted as counsel in a number of civil rights class actions, including cases challenging unfair educational opportunities for female students at K-12 schools under Title IX.

The **Center for Reproductive Rights** is a global advocacy organization that uses the law to advance reproductive freedom, an essential predicate of gender equality and full participation in social and economic life. In the United States, the Center's work focuses on protecting and expanding the constitutional, statutory, and human rights that guarantee reproductive autonomy, which includes the right to make decisions about family life free from discrimination in the workplace or elsewhere. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in

the U.S. concerning reproductive rights, in both state and federal courts. As a rights-based organization, the Center has a vital interest in ensuring that individuals and groups endeavoring to exercise their rights have robust tools to achieve redress in the courts, including the ability to seek class and systemic relief.

Since 1969, **Centro Legal de la Raza (Centro Legal)** has provided legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually, including numerous class actions on behalf of immigrant and other low-income workers. Centro Legal therefore has a significant interest in protecting concerted activity by workers to address workplace violations.

The **Civil Rights Education and Enforcement Center (CREEC)** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination in employment. CREEC's efforts to defend human and civil rights extend to all walks of life, and CREEC and its members have an interest in ensuring that our nation's civil rights laws can be vigorously and effectively enforced through individual and collective action.

Disability Rights Advocates (DRA) is a nonprofit public interest legal center that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. With offices in Berkeley, California and

New York, New York, DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, technology and housing. In *Bates v. UPS*, DRA represented a nationwide class of UPS employees and applicants with hearing loss who had been categorically excluded from certain positions as a result of the company's use of the Department of Transportation hearing standard as a threshold qualification for driving vehicles weighing 10,000 pounds or less. DRA cofounder Laurence W. Paradis successfully argued the case on appeal to the Ninth Circuit.

The **Disability Rights Education & Defense Fund (DREDF)** is a national nonprofit law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination. The ADA and other disability civil rights laws build on and explicitly incorporate the expansive remedies of other statutory nondiscrimination protections. DREDF and the disability community it represents thus have an interest in the issues presented by this case.

The **Equal Justice Society (EJS)** is transforming the nation's consciousness on race through law, social science, and the arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. We use a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. Our legal strategy aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

Founded in 1974, **Equal Rights Advocates (ERA)** is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA has litigated class action and other high-impact cases related gender discrimination and civil rights, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington*

Industries v. Ellerth, 524 U.S. 742 (1998); and *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006). Over the course of its forty-year history, ERA has frequently advocated on behalf of women working in male-dominated industries who have suffered egregious discrimination through both facially discriminatory and facially neutral policies and practices. ERA has a strong interest in ensuring that women retain the ability to fairly combat discrimination in the workplace.

Human Rights Campaign (HRC), the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community.

Justice in Aging's principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates, we seek to ensure the health and economic security of older adults with limited income and resources. Since 1972, the Justice in Aging (formerly the National Senior Citizens Law Center) has worked to promote the independence and well-being of low-income elderly and persons with disabilities, especially women, people of color, and other disadvantaged minorities. We work tirelessly to preserve and strengthen Medicaid, Medicare, Social

Security and SSI, benefits programs that allow low-income older adults to live with dignity and independence. In addition, we seek to ensure their access to the courts and to keep the courts open for justice.

Formed in 1973, **Lambda Legal Defense and Education Fund, Inc.** is the nation's oldest and largest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel of record or amicus curiae in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). Of particular relevance here, for many years, Lambda Legal has been actively litigating the issue of Title VII's application to claims of discrimination on the basis of sexual orientation or gender identity. *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Evans v. Georgia Regl. Hosp.*, 850 F.3d 1248 (11th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Based on this experience, Lambda Legal has a strong interest in defending litigants' access to Article III courts, an essential venue for adjudicating unsettled questions regarding the application of federal civil

rights laws, particularly for people of color, the financially insecure, and other socially and economically marginalized groups.

LatinoJustice PRLDEF is a national not for profit civil rights legal defense fund that engages in litigation, advocacy, and education to defend the constitutional rights and the equal protection of all Latinos under the law. Since being founded in 1972 as the Puerto Rican Legal Defense & Education Fund, we have championed an equitable society through advancing Latinx civil engagement, cultivating new Latinx community leaders, and engaging in and supporting law reform impact litigation efforts across the country that champion civil rights and equality in the areas of criminal justice, education, employment, immigrants' rights, language rights, redistricting and voting rights.

The **Law Foundation of Silicon Valley** is a nonprofit agency in San José, California, that provides free legal services to Santa Clara County residents in need in the areas of safe and affordable housing, stable homes for abused and neglected children, and addressing a number of other issues including discrimination, domestic violence, disability rights, and human trafficking. The mission of the Law Foundation is to advance the rights of under-represented individuals and families in our diverse community through legal services, strategic advocacy, and educational outreach. The Law Foundation has litigated numerous civil rights class action cases to advance the cause of justice for our clients. *See, e.g.*, *Lewis et al. v. Silvertree Mohave Homeowners' Ass'n et al.*, No. C 16-03581 WHA (N.D.

Cal. filed Jun. 24, 2016); *Huynh et al. v. Harasz et al.*, 14-CV-02367-LHK (N.D. Cal. filed May 22, 2014); *Hopkins et al. v. Flores et al.*, No. 1-05-CV-035647 (S.C.C. Super. Ct. filed Feb. 15, 2005); *Rodriguez, et al. v. Santa Clara Cnty. Dep't of Social Serv.*, No. C-97-20934 JW (N.D. Cal. filed Oct. 27, 1997); and *Lopez, et al. v. Washington Mutual Bank, FA*, 302 F.3d 900 (9th Cir. 2002).

The **Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee)** is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to mobilize the private bar in vindicating the civil rights of African Americans and other racial and ethnic minorities. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities and other disadvantaged populations. Since the 1960s, the Lawyers' Committee has relied on class and concerted actions under the Civil Rights Act of 1964 and other federal and state statutes as essential tools for combating unlawful discrimination in the workplace. The Lawyers' Committee has been involved in cases before the United States Supreme Court involving the interplay of arbitration clauses and the exercise of rights guaranteed by civil rights laws prohibiting employment discrimination, including serving as *amicus curiae* in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A. v. Animalfeeds International*, 559 U.S. 662 (2010); and *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

The **Leadership Conference on Civil and Human Rights (The Leadership Conference)** is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of public importance that will affect the civil and human rights of many individuals, and, in particular, the interests of constituencies in The Leadership Conference coalition.

Legal Aid at Work (LAAW), formerly the Legal Aid Society – Employment Law Center, represents low-wage workers facing a range of workplace issues, including unpaid wages, denials of family and medical leave and accommodation, wrongful termination, harassment, retaliation, and discrimination on the basis of race, national origin, immigration status, language, gender, sexual orientation, or disability. LAAW's clients – women, people of color, persons with disabilities, immigrants, and others in low-paying jobs – suffer discrimination, wage and hour violations, unlawful termination, harassment, threats to health and safety, and other illegal on-the-job practices. LAAW litigates law

reform and collective and class actions to change policies and practices that hinder access to equal employment opportunities. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, as well as the Fair Labor Standards Act, among others. Some of LAAW's recent cases include: *Arias v. Raimondo*, 860 F.3d 1185 (9th Cir. 2017); *Guerrero v. California Department of Corrections*, 119 F. Supp. 3d 1065 (N.D. Cal. 2015); *Ollier v. Sweetwater Union High School District*, 768 F.3d 843 (9th Cir. 2014); and *Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089 (C.D. Cal. 2013).

Founded in 1968, the **Mexican American Legal Defense and Education Fund (MALDEF)** is the leading national civil rights organization representing the 55 million Latinos living in the United States through litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws, and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment of Latinos, including many class actions in the areas of education, employment, immigrant rights, and voting rights.

Since 1973, the **National LGBTQ Task Force** has worked to build power, take action, and create change to achieve freedom and justice for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and

their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. Because LGBTQ and gender non-conforming people – especially LGBTQ/GNC people of color – face widespread systemic discrimination in employment, legal efforts to ensure that employees have access to collective action are a critical piece of our broader efforts to fight for economic justice.

The **National Women's Law Center (NWLC)** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and opportunities. Since 1972, NWLC has fought for equal opportunities and fair treatment for women in all aspects of their employment. This includes not only the right to a workplace that is free from all forms of discrimination and harassment, but also access to effective means of enforcing that right and remedying such conduct. NWLC has played a leading role in the passage and enforcement of federal civil rights laws, including through class action and pattern or practice litigation and in numerous amicus briefs involving sex and race discrimination in employment before the United States Supreme Court, federal courts of appeals, and state courts.

Letitia James is the **Public Advocate for the City of New York** – the second-highest ranking official in New York City government who serves as a citywide elected ombudsman, legislator, and litigator. Public Advocate James has advocated for stronger

anti-discrimination legislation – including the introduction of legislation that prohibits New York City employers from asking job applicants about their salary histories. She has also filed amicus briefs in cases involving workplace discrimination on the basis of sexual orientation and criminal records, and she has issued policy reports on the gender wage gap in New York City and other topics relevant to workplace discrimination.

Public Advocates, Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases to challenge the persistent, underlying causes and effects of poverty and discrimination. Its work currently focuses on achieving equality in education, housing, and transportation; in the past the organization has addressed systemic harms in employment, prisons, consumer rights, welfare benefits and health care among other issue areas. Throughout its history, Public Advocates has consistently employed the class action mechanism to obtain relief on behalf of large numbers of individuals – sometimes having had classes certified with over a million members. As such, the organization has a strong interest in the continued effective functioning of the class action mechanism in all contexts.

Public Counsel is the largest *pro bono* law firm in the nation and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Its 71 attorneys and 50 support staff – along with over

5,000 volunteer lawyers, law students, and legal professionals – assist more than 30,000 low-income individuals, families, and community organizations every year. Public Counsel addresses systemic poverty and civil rights issues through impact litigation, direct services, and policy advocacy. Our practice areas include veterans' rights, children's rights, community development, consumers' rights, immigrants' rights, and housing and homelessness.

The **Public Interest Law Project (PILP)** is a nonprofit state support center for local legal services and nonprofit public interest law programs in California. PILP focuses on the areas of affordable housing and public benefits, including the areas of food, health care and income support. In all of those areas many of our clients are frequently employed at workplaces where concerted activity and collective legal action are often necessary to protect their civil and economics right and to assist with efforts to lift them out of poverty.

Public Justice is a nonprofit legal organization that participates in high-impact litigation throughout the United States on behalf of low-wage workers, consumers, and others whose civil rights have been violated. Public Justice's Class Action Preservation Project conducts research and comments on developments in the law with the goal of ensuring that those with relatively little societal power retain access to the civil justice system and are able to join together to vindicate their rights.

The **Public Justice Center (PJC)**, is a non-profit civil rights and anti-poverty legal services organization founded in 1985 and based in Baltimore, Maryland. The PJC has a longstanding commitment to protecting the rights of low- and moderate-income workers, consumers, and renters, among others, and routinely vindicates those rights through representation in class actions, including cases challenging discriminatory and unlawful labor practices.

Located in Montgomery, Alabama, **Southern Poverty Law Center (SPLC)** has provided pro bono representation to vulnerable populations in the Southeast since 1971. SPLC has litigated or served as amicus curiae in numerous cases to vindicate the rights of low wage workers, including several class actions challenging employment discrimination, retaliation, and human trafficking. SPLC has an interest in this case because a ruling upholding class action waivers in employment agreements would adversely impact SPLC's future clients.

APPENDIX B

List of Selected Civil Rights Concerted Actions

AGE DISCRIMINATION CASES

Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008); No. 1:97-cv-00012-DRH, Dkt. 312 (N.D.N.Y. May 1, 2009) (after trial, back pay)

Merritt v. Wellpoint, Inc., No. 3:08-cv-272, Dkts. 93, 101 (E.D. Va. Jun. 27, 2011) ($2.6 million)

Williams v. Sprint/United Mgmt. Co., 2007 WL 2694029 (D. Kan. Sept. 11, 2007) ($57 million for 1697 individuals)

DISABILITY DISCRIMINATION CASES

Bates v. UPS, No. C99-2216 THE, Dkt. 647 (N.D. Cal. Dec 13, 2010) (injunctive relief, $5.8 million for 1000 individuals)

Cookson v. NUMMI, No. C10-02931 CRB, Dkt. 68 (N.D. Cal. Jan. 27, 2012) ($6 million for 500 individuals)

Knee v. Henderson, 2001 WL 34395138 (M.D. Pa. 2001) ($2.4 million for 235 individuals)

GENDER DISCRIMINATION CASES

Amochaev v. Citigroup Global Mkts., 2007 WL 484778 (N.D. Cal. Aug. 13, 2008); *as described in Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090,

at *7 (N.D. Cal. Oct. 22. 2008) (injunctive relief, $33 million for 2400 women)

Augst-Johnson v. Morgan Stanley & Co., Inc., No. 1:06-cv-01142-CLL (D.D.C. Oct. 26, 2017) (injunctive relief, $46 million for 2800 women)

Aviles v. BAE Systems Norfolk Ship Repair, Inc., No. 2:13-cv-00418, Dkt. 111 (E.D. Va. Feb. 10, 2016); Dkt. 103-3 (injunctive relief, $3 million for 166 women)

Beavers v. Am. Cast Iron Pipe Co., 164 F. Supp. 2d 1290, 1296 (N.D. Ala. 2001) (injunctive relief, $5 million)

Beck v. Boeing Co., No. 2:00-cv-00301-MJP (W.D. Wash. Oct. 8, 2004) (injunctive relief, $72.5 million for 25,000 women)

Beckmann v. CBS Inc., No. 3:96-cv-01172, 2000 WL 33281052 (D. Minn. 2000) (injunctive relief, $8 million for 200 women)

Bellifemine v. Sanofi-Aventis U.S. LLC, 2010 WL 3119374 (S.D.N.Y. Aug. 6, 2010) (injunctive relief, $15.4 million)

Bouman v. Block, 940 F.2d 1211, 1226 (9th Cir. 1991) (after trial, injunctive relief)

Brown v. Medicis Pharm. Corp., No. 13-cv-1345, Dkt. 52 (D.D.C. July 11, 2016) (injunctive relief, $7.15 million for 225 women)

Bunch v. Rent-a-Center, 2001 WL 1712351 (W.D. Mo. 2001) (injunctive relief, $12.25 million for 4600 women)

Butler v. Home Depot, Inc., No. C-94-4335 SI (N.D. Cal.), https://www.clearinghouse.net/detail.php?id=9471 (injunctive relief, $87.5 million)

Calibuso v. Bank of Am. Corp., 299 F.R.D. 359 (E.D.N.Y. 2014) (injunctive relief, $39 million)

Card v. City of Cleveland, No. 1:08-cv-02325-DAP, Dkt. 39 (N.D. Ohio July 14, 2011) (back pay)

Carlson v. C.H. Robinson Worldwide, Inc., 2006 WL 2671105 (D. Minn. Sept. 18, 2005); https://www.clearinghouse.net/chDocs/public/EE-MN-0076-0002.pdf (injunctive relief, $15 million for 1800 individuals)

Coates v. Farmers Grp. Inc., 2016 WL 5791413 (N.D. Cal. Sept. 30, 2016) (injunctive relief, $4.1 million for 300 women)

Cronas v. Willis Group Holdings, Ltd., 2011 WL 6778490 (S.D.N.Y. Dec. 19, 2011) (injunctive relief, $11.6 million for 316 women)

Da Silva Moore v. Publicis Groupe SA, No. 11-cv-1279, Dkt. 618 (S.D.N.Y. May 20, 2016) ($2.9 million for 100 women)

Duling v. Gristede's Operating Corp., 2013 WL 3146772 (S.D.N.Y. June 19, 2013) (injunctive relief, $1.45 million for 600 women, plus fees)

Easterling v. State of Conn. Dep't of Corrections, 783 F. Supp. 2d 323 (D. Conn. 2011); No. 3:08-cv-826 (JCH) (D. Conn. 2013); http://www.clearinghouse.net/chDocs/public/EE-CT-0019-0003.pdf (summary judgment granted, injunctive relief, $1.8 million for 124 women, plus fees)

Ebbert v. Nassau Cty., 2011 WL 6826121, at *1 (E.D.N.Y. Dec. 22, 2011) (injunctive relief, $7 million)

Ellis v. Costco Wholesale Corp., 2014 WL 12641574 (N.D. Cal. May 27, 2014); https://www.clearinghouse.net/chDocs/public/EE-CA-0302-0009.pdf (injunctive relief, $8 million)

Estate of Pitre v. W. Elec. Co., Inc., 719 F. Supp. 966 (D. Kan. 1989); *aff'd in part, rev'd in part*, 975 F.2d 700 (10th Cir. 1992); *on remand* 1994 WL 132958 (D. Kan. Mar. 31, 1994) (after trial, $1 million for 80 women)

Hartman v. Powell, 2001 WL 410461 (D.C. Cir. Mar. 15, 2001) (injunctive relief, $531 million for 1100 women)

Hnot v. Willis Group Holdings Ltd., 2001 WL 36115583 (S.D.N.Y. July, 2001) (injunctive relief, $8.5 million for 180 women, plus fees)

Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991); settlement reported (E.D. Wis. Jan. 19, 1994) https://www.clearinghouse.net/detail.php?id=10665&search=source%7Cgeneral%3BcaseName%7Cjohnson

%20controls%3BcaseCat%7CEE%3Borderby%7CfilingYear%3B (after Supreme Court ruling, back pay)

Jarvaise v. Rand Corp., 212 F.R.D. 1 (D.D.C. 2002); *Jarvaise v. Rand Corp.*, No. 1:96-cv-02680-RWR, Dkt. 253 (D.D.C., Dec. 18, 2007) (injunctive relief, $65/class member per month for 41 months)

Jensen v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993); *damages rulings vacated, remanded*, 130 F.3d 1287 (8th Cir. 1997) (after trial, injunctive relief, damages)

Kraszewski v. State Farm Gen. Ins. Co., 912 F.2d 1182, 1183 (9th Cir. 1990) (after trial, back pay)

Kyriazi v. W. Elec. Co., 647 F.2d 388 (3d Cir. 1981) (after trial, injunctive relief, back pay)

Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998); 1998 WL 1661385 (S.D.N.Y. July 28, 1998); https://www.clearinghouse.net/detail.php?id=10620&search=source%7Cgeneral%3BcaseName%7Csmith%20barney%3BcaseCat%7CEE%3Borderby%7CfilingYear%3B ($150 million for 20,000 women)

Orlowski v. Dominick's Finer Foods, Inc., 1999 WL 1823288 (N.D. Ill. 1999); https://www.clearinghouse.net/chDocs/public/EE-IL-0290-0001.pdf (injunctive relief, $7.65 million, plus fees)

Palmer v. Combined Ins. Co., No. 1:01-cv-09502, Dkts. 80, 111 (N.D. Ill. Jan. 12, 2005); https://www.

clearinghouse.net/chDocs/public/EE-IL-0284-0005.pdf; https://www.clearinghouse.net/chDocs/public/EE-IL-0284-0002.pdf (injunctive relief, $8.5 million)

Pan v. Qualcomm Inc., No. 3:16-cv-01885-JLS-DHB (S.D. Cal. July 31, 2017); https://scholar.google.com/scholar_case?case=27979207294598644 32&hl=en&as_sdt=6&as_vis=1&oi=scholarr (injunctive relief, $19.5 million for 3300 women)

Schaefer v. Tannian, 895 F. Supp. 175 (E.D. Mich. 1995) (after trial, injunctive relief, $10.8 million)

Shores v. Publix Super Mkts, Inc., 1997 WL 714787 (M.D. Fla. Jan. 27, 1997); https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1146&context=condec (injunctive relief, $63.5 million, plus fees)

Stagi v. Nat'l R.R. Passenger Corp., 880 F. Supp. 2d 564 (E.D. Pa. 2012) (injunctive relief, $1.99 million for 5400 women)

Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992); https://www.clearinghouse.net/chDocs/not_public/EE-CA-0276-0001.pdf (after trial, injunctive relief, $80 million)

Vasich v. City of Chicago, 2013 WL 6730106 (N.D. Ill. Dec. 20, 2013) (injunctive relief, $2 million)

Velez v. Novartis Pharm. Corp., 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (after trial, injunctive relief, $152.5 million for 6000 women)

Warnell v. Ford Motor Co., No. 98-C-1503, Dkt. 159 (N.D. Ill. Nov. 7, 2000); 2000 WL 33232272 (N.D. Ill. 2000) ($9 million plus fees)

Wellens v. Daiichi Sankyo, Inc., No. 3:13-cv-0058 (N.D. Cal. 2015) (injunctive relief, $8.2 million)

Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975) (after trial, back pay)

Womack v. Dolgencorp, No. 06-cv-465, Dkt. 214 (N.D. Ala. Apr. 6, 2012); http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1489&context=condec (injunctive relief, $18.75 million plus fees)

Women's Comm. For Equal Emp't Opportunity (WC=EO) v. Nat'l Broad. Co., 76 F.R.D. 173 (S.D.N.Y. 1977) (injunctive relief, $1.4 million plus fees)

RACE DISCRIMINATION CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (after trial, back pay)

Bert v. AK Steel Corp., 2008 WL 4693747 (S.D. Ohio Oct. 23, 2008) (injunctive relief, $3400 to each class member plus fees)

Brand v. Comcast Corp., No. 11-cv-8471 (N.D. Ill. June 15, 2016) (injunctive relief, $7.2 million for 385 individuals)

Brown v. Yellow Transp., No. 08-5908, Dkt. 181 (N.D. Ill. Sept. 25, 2012); https://www.clearinghouse.

net/chDocs/public/EE-IL-0329-0004.pdf (consent decree) ($11 million for 350 individuals)

Buttram v. UPS, 1999 U.S. Dist. LEXIS 23556 (N.D. Cal. Apr. 14, 1999) (injunctive relief, $12 million)

Cogdell v. Wet Seal, Inc., 2013 WL 12134045 (C.D. Cal. Dec. 9, 2013); http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1282&context=condec (injunctive relief, $7.5 million)

Cokely v. NY Convention Ctr., No. 00 Civ. 4637(CBM), Dkt. 150 (S.D.N.Y. Aug. 21, 2006); https://www.clearinghouse.net/chDocs/public/EE-NY-0205-0002.pdf (injunctive relief, $8.4 million)

Commonwealth of Pa. v. Local 542, Int'l Union of Operating Eng'rs, 1982 WL 770 (E.D. Pa. Dec. 15, 1982) (after trial, $1.5 million for 599 individuals)

Cook v. Howard Indus., Inc., 2013 WL 943664 (S.D. Miss. Mar. 11, 2013) ($3 million, plus fees)

Creighton v. Metro. Life Ins. Co., No. 1:15-cv-08321-WHP, Dkts. 101-1, 138 (S.D.N.Y. June 27, 2017) ($32.5 million)

Curtis-Bauer v. Morgan Stanley, 2008 WL 4667090 (N.D. Cal. Oct. 22, 2008) (injunctive relief, $16.5 million for 1300 individuals)

Davis v. Eastman Kodak Co., Nos. 04-CV-6098, 07-CV-6512, Dkt. 351 (W.D.N.Y. Sept. 3, 2010) (injunctive relief, $21.4 million for 3000 individuals)

Doe v. Mulcahy, Inc., No. 08-306, Dkt.156 (D. Minn. Jan. 11, 2010) (injunctive relief, $6 million)

Domingo v. NE Fish Co., 727 F.2d 1429 (9th Cir. 1984) (after trial, back pay)

Estrada v. Bashas', Inc., No. CIV 02-0591-DJH, Dkt. 360 (D. Ariz. April 24, 2015) ($6.5 million for 12,000 individuals)

Franks v. Bowman Transp., 424 U.S. 747 (1976) (after trial, back pay)

Gonzales v. Pritzker, No. 10-3105, Dkt. 377 (S.D.N.Y. Sept. 20, 2016); https://www.clearinghouse.net/chDocs/public/EE-NY-0254-0008.pdf; https://www.clearinghouse.net/chDocs/public/EE-NY-0254-0010.pdf (injunctive relief, $5 million)

Griggs v. Duke Power Co., 1972 WL 215, at *1 (M.D.N.C. Sept. 25, 1972) (after trial, injunctive relief)

Hammon v. Barry, 752 F. Supp. 1087, 1089 (D.D.C. 1990) (injunctive relief, $3.5 million for 180 individuals)

Haynes v. Shoney's, Inc., 1993 WL 19915 (N.D. Fla. Jan. 25, 1993) (injunctive relief, $105 million)

Hopson v. Mayor & City Council of Baltimore, No. CIV.A. AMD-04-3842, Dkt. 306 (D. Md. June 23, 2009) (injunctive relief, $2.5 million for 15 plaintiffs)

Huguley v. GM Corp., 128 F.R.D. 81, 82 (E.D. Mich. 1989), *aff'd*, 925 F.2d 1464 (6th Cir. 1991), *aff'd*, 999 F.2d 142 (6th Cir. 1993) (injunctive relief, $1.6 million)

Ingram v. Coca-Cola Co., 200 F.R.D. 685 (N.D. Ga. 2001) (injunctive relief, $38,000 per class member)

Jaffe v. Morgan Stanley & Co., No. 3:06-cv-03903-THE, Dkt. 249 (N.D. Cal. Oct. 22, 2008) (injunctive relief, $16 million for 1300 individuals)

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977) (after trial, injunctive relief)

Kerner v. City of Denver, 2016 WL 3639937 (D. Colo. July 8, 2016) (after trial, $1.7 million)

Ketchum v. Sunoco, Inc., No. 2:01-cv-01042-CG, Dkt. 60 (E.D. Penn. Dec. 2, 2004); https://www.clearinghouse.net/chDocs/public/EE-PA-0202-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-PA-0202-0002.pdf (injunctive relief, $5.5 million for 200 individuals)

Kirkland v. NY State Dep't of Corr. Servs., 711 F.2d 1117, 1121 (2d Cir. 1983) (injunctive relief)

Latino Officers Ass'n City of N.Y., Inc. v. City of N.Y., 2004 WL 2066605 (S.D.N.Y. Sept. 15, 2004) (injunctive relief, $20 million)

Leonard v. Southtec, LLC, No. 3:04-0072, Dkt. 96 (M.D. Tenn. May 15, 2007); https://www.clearinghouse.net/chDocs/public/EE-TN-0141-0002.pdf; https://www.clearinghouse.net/chDocs/public/EE-TN-0141-0003.pdf (injunctive relief, $900,000 for 500 individuals)

Lilly v. Harris-Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983); 842 F.2d 1496 (4th Cir. 1988) (after trial, back pay)

Lurns v. Russell Corp., 604 F. Supp. 1335 (M.D. Ala. 1984) (injunctive relief, $250,000)

McClain v. Lufkin Indus., Inc., 649 F.3d 374 (5th Cir. Aug. 8, 2011) (after trial, injunctive relief, $5.5 million, plus fees)

McReynolds v. Merrill Lynch, No. 1:05-cv-06583, Dkt. 616 (N.D. Ill. Dec. 6, 2013); https://www.clearinghouse.net/chDocs/public/EE-IL-0282-0002.pdf; https://www.clearinghouse.net/chDocs/public/EE-IL-0282-0005.pdf (injunctive relief, $160 million for 700 individuals)

McReynolds v. Sodexho Marriott Servs., Inc., No. 1:01-cv-00510-ESH, Dkt. 312 (D.D.C. Aug. 10, 2005); https://www.clearinghouse.net/chDocs/public/EE-DC-0034-0001.pdf (injunctive relief, $80 million)

Middleton v. Publix Supermarkets Inc., 2000 WL 34248105 (M.D. Fla. 2000); https://www.clearinghouse.net/chDocs/public/EE-FL-0155-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-FL-0155-0002.pdf (injunctive relief, $10.5 million)

Moore v. Johnson, No. 1:00-cv-00953, Dkt. 845 (D.D.C. May 3, 2017); https://www.clearinghouse.net/chDocs/public/EE-DC-0043-0024.pdf; https://www.clearinghouse.net/chDocs/public/EE-DC-0043-0026.pdf (injunctive relief, $24 million for 114 individuals)

Moore v. Norfolk S. Corp., 2000 WL 33951131 (N.D. Ala. 2000); https://www.clearinghouse.net/chDocs/public/EE-AL-0118-0002.pdf; https://www.clearinghouse.net/

chDocs/public/EE-AL-0118-0003.pdf (injunctive relief, $29 million for 7700 individuals)

NAACP. v. N. Hudson Reg. Fire & Rescue, 665 F.3d 464 (3d Cir. 2011) (after trial, injunctive relief)

Nelson v. Wal-Mart Stores, 2009 WL 2486888 (D. Ark. Aug. 12, 2009); https://www.clearinghouse.net/chDocs/public/EE-AR-0062-0002.pdf (injunctive relief, $17.7 million)

Newsome v. Up-to-date Laundry, No. 1:01-cv-02257-WDQ, Dkt. 99 (D. Md. Nov. 23, 2004); https://www.clearinghouse.net/chDocs/public/EE-MD-0138-0006.pdf (consent decree) (injunctive relief, $1.8 million)

Owolabi v. Nw. Airlines, 2002 WL 31415000 (N.D. Ga. 2002) ($14.4 million)

Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982); *Pettway v. Am. Cast Iron Pipe Co.*, 721 F.2d 315 (11th Cir. 1983) (after trial, injunctive relief, back pay)

Port Auth. Police Asian Jade Society of N.Y., N.J., Inc. v. Port Auth. of N.Y. & N.J., 2010 WL 132349 (S.D.N.Y. Jan. 4, 2010) (after trial, back pay for 7 plaintiffs, plus fees)

Reed v. Dresser, Inc., No. 08-C-0818 (E.D. Wis. Sept. 23, 2010) ($950,000)

Roberts v. Texaco, Inc., 1997 U.S. Dist. LEXIS 23848 (S.D.N.Y. Mar. 21, 1997); https://www.clearinghouse.net/chDocs/public/EE-NY-0165-0003.pdf (injunctive relief, $115 million for 1350 individuals)

Royal v. Aramark Corp., 1999 WL 1823282 (E.D. Pa. 1999) ($3.75 million for 268 individuals)

Satchell v. FedEx Corp., 2007 WL 1114010 (N.D. Cal. Apr. 13, 2007); https://www.clearinghouse.net/chDocs/public/EE-CA-0288-0019.pdf; https://www.clearinghouse.net/chDocs/public/EE-CA-0288-0016.pdf (injunctive relief, $53.5 million)

Sheppard v. Consol. Edison Co. of New York, 2002 WL 2003206 (E.D.N.Y. Aug. 1, 2002) (injunctive relief, $6.745 million)

Shipes v. Trinity Indus., 987 F.2d 311 (5th Cir. 1993) (after trial, back pay)

Slaughter v. Wells Fargo Advisors, No. 1:13-cv-06368 (N.D. Ill. 2016); http://www.wfafinancialadvisorracesettlement.com/media/795056/slaughter_v_wfa_-_amended_settlement_agreement.pdf (settlment agreement) ($35.5 million for 500 individuals)

Sledge v. J.P. Stevens & Co., 1980 WL 236 (E.D.N.C. Apr. 4, 1980); 1989 WL 90562 (E.D.N.C. Feb. 23, 1989) (after trial, injunctive relief, back pay)

Smith v. Nike Retail Servs., 2007 WL 2590363 (N.D. Ill. Jul. 30, 2007); Dkts. 186-187 (N.D. Ill. Oct. 2, 2007) (injunctive relief, $7.6 million for 230 individuals)

Stewart v. Rubin, 948 F. Supp. 1077 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (injunctive relief, $4.7 million for 245 individuals)

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Tucker v. Walgreen Co., (S.D. Ill, Mar. 24, 2008); https://www.clearinghouse.net/chDocs/public/EE-IL-0258-0007.pdf (injunctive relief, $24.4 million for 10,000 individuals)

Turnley v. Banc of America Inv. Servs., No. 07cv10949–NG, Dkt. 148 (D. Mass. Nov. 18, 2009); https://www.clearinghouse.net/chDocs/public/EE-MA-0021-0003.pdf; https://www.clearinghouse.net/chDocs/public/EE-MA-0021-0004.pdf (injunctive relief, $7.2 million for 500 individuals)

United States v. City of New York, 717 F.3d 72 (2d Cir. 2013); 2013 WL 2458471 (E.D.N.Y. June 3, 2013) (after trial, injunctive relief, back pay)

Vines v. Covelli Enters., 2012 WL 5992114 (W.D. Pa. Nov. 30, 2012); Dkt. 30 (W.D. Pa. Dec. 14, 2012) ($0.70 per hour for each hour worked by class member)

Wade v. Kroger Co., 2008 WL 4999171 (W.D. Ky. Nov. 20, 2008) (injunctive relief, $16 million)

Warren v. Xerox Corp., 2008 WL 4371367 (E.D.N.Y. Sept. 19, 2008) (injunctive relief, $12 million for 1500 individuals)

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Nos. 16-285, 16-300 and 16-307

RECORD AND BRIEF

Supreme Court, U.S.
FILED
1 0 2017
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In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,
v.
STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth, And Fifth Circuits

BRIEF OF *AMICUS CURIAE* NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

MATTHEW W. FINKIN
Counsel of Record
NATIONAL ACADEMY OF ARBITRATORS
University of Illinois College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820
(217) 333-3884
mfinkin@illinois.edu

Counsel for Amicus Curiae

August 2017

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id.*

The Academy's rules assure that only the most experienced, ethical, and well-respected arbitrators are elected to membership. Scholars who have made significant contributions to the understanding of labor law and labor relations may also be elected. Such is the Academy's concern for strict neutrality that its members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and even from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 600 U.S. and Canadian members.

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[1] Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements, *i.e.*, labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), in cases concerning the arbitration of individual statutory claims, *i.e.*, employment arbitration, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and, in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), where the two might conflate.

The Academy's interest here is twofold. The first derives from its foundational concern for the fairness of the arbitral process with special concern when arbitration is compelled by an employer policy or contract. The Academy was a prime mover in what was to become the 1995 multi-party Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. The Academy's *Policy Statement on Employment Arbitration* (May 20, 2009), deals specifically with arbitration policies that preclude the presentation of collective claims.

The second draws from a deep experiential well. Academy members have long engaged in arbitrating claims involving the contractual and statutory rights of groups of workers and their employers under collective bargaining agreements. The Academy respectfully submits that experience usefully informs the issues

before the Court; that the Court would meaningfully benefit from an understanding of how these collective claims are arbitrated – swiftly, informally, and simply.

SUMMARY OF ARGUMENT

The prohibition of joint or group collective arbitration is defended on the theory that the presentation of a common claim in concert would sacrifice the benefits of simplicity, flexibility, informality, and expedition that theoretically inhere only in bilateral arbitration. The theory is refuted by the facts.

Amicus National Academy of Arbitrators will show that collective employment arbitration presents no prospect of the "procedural morass" that concerned the Court in the application of Rule 23 FRCP to consumer arbitration. Sections I and II, *infra*. Drawing on its seventy years of experience in labor arbitration, *amicus* will show that collective statutory claims presented in employment arbitration can be heard as simply, flexibly, informally, and expeditiously as these very same claims are commonly heard in labor arbitration, Section III, *infra*; and, that an employer's policy prohibiting employees from pursuing common complaints together would result in the bringing of numerous repetitive individual claims, if they were all to seek redress. The presentation of all these individual claims, *would* produce a genuine "procedural morass." Section IV, *infra*. Thus, the premise of employer policies prohibiting individual workers from joining one

another in pursuing a common claim rests on the assumption that a multiplicity of individual claims would not actually be submitted. When employees are forbidden to join together and are most unlikely to proceed individually employers will rarely be called to account, leaving a gap in the realization of basic employment protections.

ARGUMENT

I. A Collective or "Class" Arbitration is Not a Rule 23 Class Action

The employer policies at issue do far more than prohibit employees from bringing or participating in a Rule 23 class action – in court or in arbitration. These policies deny employees the right to exercise any concerted legal action: two employees who claim to have suffered a common wrong – have been required to endure the same sexual harassment, have suffered the same age-discriminatory lay-off, or have been denied the same donning and doffing overtime pay – are prohibited from bringing their claims together. They can be heard; but only as individuals. The legal justification for this prohibition rests on a misperceived connection between Rule 23 class actions and collective arbitrations.

In *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Court determined that a company's preclusion of class arbitration in its consumer sales agreement was an acceptable trade-off in order to retain the

promise of swiftness, informality, and flexibility held by bilateral arbitration:

> [T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. . . .
>
> But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.

563 U.S. at 348, referring to the elements of class action certification under Rule 23 FRCP. The Court reiterated this consideration in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304, 2310 (2013).

However, neither *D.R. Horton* nor *Murphy Oil* involved consumer claims, nor were the claimants in those cases, who were asserting claims under the Fair Labor Standards Act (FLSA), seeking to have an arbitrator apply Rule 23. In *D.R. Horton*, the employees' lawyer wrote first to inform the employer that he was seeking to arbitrate on behalf of two named employees, then five other named employees and other "similarly situated," all of whom occupied a job category allegedly

misclassified by the employer under the FLSA.[2] In *Murphy Oil*, the employee had commenced a collective action under 29 U.S.C. § 216(b) alleging overtime violations under the FLSA.[3] Nevertheless, the Fifth Circuit applied the Court's Rule 23 reasoning in *Concepcion*:

> [A]s *Concepcion* makes clear, certain procedures are *a practical necessity* in class arbitration . . . (listing adequate representation of absent class members, notice, opportunity to be heard, and right to opt-out). Those procedures are also part of class actions in court. As *Concepcion* held as to classwide arbitration, requiring the availability of class actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

D.R. Horton v. NLRB, 737 F.3d 344, 359-60 (5th Cir. 2013). In *Murphy Oil*, the Fifth Circuit adhered to its prior ruling, 808 F.3d 1013, 1015 (5th Cir. 2015). Not to put too fine a point on it, the proposition that Rule 23-like procedures are a "practical necessity" in group or other multi-claimant employment arbitration is counter-factual. The proposition is negated by the practice of labor arbitration over many decades.

Rule 23's requirements are exacting, driven in part out of concern for the binding effect of a judgment

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[2] *D.R. Horton*, 357 NLRB 2277, 2291 (2012) (facts recited in the decision of the Administrative Law Judge).

[3] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 at p. 3 (2014) (slip opinion).

on absent class members. That concern does not apply when the employees' collective claims are not presented in the framework of Rule 23. Speaking of collective actions under § 216(b) of the FLSA, for example, this Court has noted that "Rule 23 actions are *fundamentally* different from collective actions" under that Act. *Genesis Healthcare Corp. v. Symczk*, ___ U.S. ___, 133 S. Ct. 1523, 1529 (2013) (emphasis added). Under § 216(b), there is no exacting determination of numerosity, typicality, or representational adequacy, and the situation of the named claimants need only be "similar" in order for them to be notified and invited to be represented. Only those who choose to opt in and become named plaintiffs are bound by the judgment, subject to a judicial determination of their conformity to § 216(b)'s requirements of similar situation. *See generally*, 7B Fed. Prac. & Pro. Civ. § 1807 (3d ed. 2016) ("Collective Actions Under the Fair Labor Standards Act"). If greater flexibility and informality distinguishes a § 216(b) "collective action" from a Rule 23 class action – and it does – a collective arbitration, to which the procedure of "class certification" does not apply, affords simplicity, informality and flexibility *a fortiori*. Section III, *infra*.

The paradigmatic example is of collective claims asserted in labor arbitration. Unions routinely bring "class grievances" before arbitrators on behalf of employees covered by the collective bargaining agreement: claims of departure from the agreement as well as legal claims incorporated into the agreement. Section II, *infra*. These claimants are joined together by

their shared claim of a common contractual or legal wrong. Such is the very stuff of "class" arbitration, day in and day out in the labor union context and has been for over a century.

Thus, the concern that the complexity of class action litigation, when transferred into the employment arbitration, will swamp the informality and flexibility that arbitration promises is misplaced in cases when no such transfer is involved. In *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), this Court, building on the body of law the Court has fashioned to govern labor arbitration – *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), *United Steelworkers v. Enterprise Wheel Car Corp.*, 363 U.S. 593 (1960), *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991) – emphasized that the "simplicity, informality, and expedition of [labor] arbitration" applied to the plaintiffs' claim. 556 U.S. at 269. Yet all these cases involved group claims that were or could be asserted collectively in arbitration.[4] Importantly, *14 Penn Plaza* itself concerned an alleged act of statutory age discrimination suffered by three employees in common

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[4] Where, for example, a group claim of violation of wage and hour or wage payment law requires an interpretation of the provisions of a collective bargaining agreement, the group's judicial action is pre-empted by § 301 of the Labor Act: the claim thus proceeds into labor arbitration as a group or class claim in which the statutory issue will be resolved. *E.g.*, *Rueli v. Bayside Health, Inc.*, 835 F.3d 53, 64 (1st Cir. 2016); *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 106 (4th Cir. 2014).

whose grievances were presented jointly by their union.[5] The Court held that their collective claim should be heard in labor arbitration.

The question then is not whether Rule 23's exacting formalities must obtain in an employment arbitration as a "practical necessity" – for they do not – but whether collective claims can be heard in employment arbitration without entering a "procedural morass" of the kind the Court adverted to in *Concepcion*. The experience of labor arbitration speaks volumes to this question. Section II, *infra*.

II. Collective or "Class" Claims are Common Fare in Labor Arbitration Without Any Loss of Simplicity, Flexibility, Expedition, or Informality

Attention turns first to the regulatory character of the collective bargaining agreement. The collective agreement is more than a memorialization of a promissory exchange. It is a "generalized code." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). In applying the agreement's text, labor arbitrators draw on industrial practice, on the "common law of the shop," and on external law – either as expressly incorporated into it, as in *14 Penn Plaza, LLC v. Pyett*, *supra*, or as the law informs the text, as,

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[5] First Amended Complaint ¶¶ 38-39 *in Pyett v. Pennsylvania Bldg. Co.*, No. 04CV07536 (NRB) (Nov. 1, 2004).

today, it often does.[6] It is a longstanding maxim that for the parties to the collective agreement, it is "the law." Neil Chamberlain & James Kuhn, COLLECTIVE BARGAINING 121-30 (2d ed. 1965) (*"The Governmental Concept and the Agreement as Law"*).

The Employer's adherence to the agreement is assured through the Union's use of the grievance-arbitration procedure. All employees covered by the agreement are represented by the Union. The Employer's obligation to co-operate in the grievance procedure is assured by section 8(a)(5) of the National Labor Relations Act; the Employer's "duty to bargain" extends to "any question arising" under the collective agreement. 29 U.S.C. § 158(d).

Consequently, to allow the Union to evaluate whether a grievance should be filed and pursued to arbitration the Employer must provide the Union, at its request, with all non-confidential information in its possession that is relevant to the Union's decision. *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY § 20.4 (2013). The request must be honored even in advance of any formal grievance. If a request is denied it can be pursued to the National Labor Relations Board as an unfair labor practice. Though resort to the arbitrator to secure that information is available, such resort is not required. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). As

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[6] Martin Malin, *Revisiting the Meltzer-Howlett Debate on External Public Law in Arbitration: Is it Time for the Courts to Declare Howlett the Winner?*, 24 The Labor Lawyer 1 (2008).

the Court explained, considering a demand for information about the possible wrongful transfer or lay-off of a number of employees, the duty to disclose under the Act is subject to a "discovery-type" standard." *Id.* at 437. The leading one-volume treatise summarizes the law thusly,

> The employer clearly must furnish information as to wage rates and classifications, merit pay increases, the costs of a welfare benefit plan . . . information regarding overtime hours worked by unit employees, their marital status, surveys and studies relating to wages or other working conditions, company practices regarding probationary employees, layoffs resulting from subcontracting, and seniority lists [and a good deal more].

Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY, *supra* § 20.5 at p. 651 (references omitted).

This aspect of the grievance-arbitration process in the unionized workplace is relevant here for two reasons. First, though the scope and process of disclosure may be broad, it has not proven to be burdensome in practice. *See* § 20.4 **Advocate Practice Point** *in* Gorman & Finkin, *id.* at pp. 649-50. For the most part, informational disclosure functions as a well-accepted part of the system of grievance processing and arbitration. *Id.*

Second, when the information reveals managerial action arguably violative of the labor contract that could affect a number of employees, possibly quite a

large number, the Union's response can be, in labor parlance, a "class grievance"; that is, a grievance claiming that a group of workers has suffered in common a violation of a contract term or of a legal protection – including a statutory protection – incorporated in the agreement. Such collective claims are frequently presented and heard. As a basic text on labor arbitration put it,

> An arbitrator may appropriately grant class relief when the grievance is filed by the union as representative of a group of similarly situated employees, or the grievance is clearly intended to apply to all employees in a group.

THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS § 10.30 (Theodore St. Antoine, ed., 2d ed 2005) (blackletter in original). The rationale for hearing these claims is simple:

> By joining multiple complaints into one grievance, identical or similar issues can be decided in one hearing, thus permitting the expeditious, efficient, and inexpensive handling of the matter in dispute.

Id. at 395-96.

It bears emphasis that a "class" labor arbitration is not a Rule 23 class action, subject to exacting preconditions, nor is it akin to a § 216(b) collective action subject to a less exacting certification procedure. A "class" labor arbitration entails the Union's assertion of a common violation – of contract or law – which, if the union satisfies its burden of proof before the arbitrator that such a violation has occurred, proceeds to

the identification of those suffering the common wrong and the award of an appropriate remedy.[7]

An abbreviated review of recent awards reveals not only how common such class claims are, as a staple of labor arbitration, but also how the issues presented in that forum echo or replicate labor protective legislation; for example, the FLSA and cognate state wage payment law. To mention just a few: a "class grievance on behalf of all affected employees" that paychecks were not issued to the workforce on a weekly basis, *Allied Waste, Inc.*, 2005 LA Supp. 111592 (Goldberg, Arb. 2005); a "class action for all employees regarding the nonpayment of extra driving time from an employee's home to the Company's branch office," *ADT, LLC*, 133 LA 1821 (Felice, Arb. 2014); a "class action on behalf of 'all affected employees'" for payment for check-in/check-out time, *First Student, Inc.*, 131 LA 736 (Landau, Arb. 2013); and, even a "class grievance" over the Employer's failure to distribute pay stubs to the work force by U.S. mail, *Caterpillar Inc.*, 126 LA 554 (Goldstein, Arb. 2009).

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[7] In some cases the parties agree to bifurcate the hearing: the arbitrator is asked first to decide the question of liability; and, if the finding is affirmative, a second phase determines the remedy or remedies. *E.g.*, *New York State Nurses Ass'n*, 2014 LA Supp. 165894 (Douglas, Arb. 2014) (overtime pay dispute). More often, after finding a violation the arbitrator simply retains jurisdiction if the parties fail to agree on the remedies. *E.g.*, *Village of Matteson*, 2015 LA Supp. 200579 (Bierig, Arb. 2015) (compensation for emergency closures); *Lockheed Martin Aeronautics, Co.*, 2002 LA Supp. 109843 (Abrams, Arb. 2002) (back pay for misassigned work).

Note also the steady drumbeat of class claims for unpaid overtime that have been efficiently resolved in labor arbitration affecting the rights of large numbers of workers: *Hanson Aggregates Midwest, Inc.*, 2003 LA Supp. 110236 (Skulina, Arb. 2003) ("The grievance is a class grievance for" workers on the third shift); *GAF Materials Corp.*, 2004 LA Supp. 101044 (Sargent, Arb. 2004) ("a class grievance on behalf of all employees affected by the overtime violation"); *Green Specialty Care Center*, 126 LA 1517 (Dean, Arb. 2009) ("this class action grievance" on availability of overtime); *Cascade Steel Rolling Mills, Inc.*, 2003 LA Supp. 110598 (Lumbley, Arb. 2003) (a "class action grievance" on entitlement to overtime pay) – as well as for vacation and holiday pay; *United Parcel Service, Inc.*, 2003 LA Supp. 110449 (Zobrak, Arb. 2003) ("Class Action"); *Interstate Brands Corp.*, 121 LA 1720 (Duda, Arb. 2005) ("Class Action grievance"); *Greektown Casino*, 120 LA 25 (Brodsky, Arb. 2004) ("class action grievance"); *Troy Laminating and Coating, Inc.*, 117 LA 115 (Duff, Arb. 2002) (a "class action grievance"); *Brechteen Co.*, 114 LA 967 (Brodsky, Arb. 2000) ("a class action grievance"); *et cetera*.

These awards are not referenced to suggest that wage and hour cases differ in any way from other statutory violations that may affect a group and that could be brought collectively in labor arbitration. Examples of employment discrimination claims and other public policies are equally common: the claim that a test for promotion has a disparate impact on women and minorities, *Toledo Edison Co.*, 105 LA 167 (Curry, Arb.

1995); that the disallowance of religious exemption from Sunday work violated Title VII of the Civil Rights Act, *Avis Rent-A-Car Sys.*, 107 LA 197 (Shanker, Arb. 1996); that the requirement of a commercial driver's license discriminated against older workers, *The Lion, Inc.*, 109 LA 19 (Kaplan, Arb. 1997). Wage and hour issues are used as illustrative here only because all the cases before the Court involve them.

Suffice it to say, collective workplace claims can be handled, as the Court said in *Pyett*, with the "simplicity, informality, and expedition" that is characteristic of labor arbitration. 556 U.S. at 269. Accordingly, when an experienced labor arbitrator confronted an employer's assertion that because *Concepcion* had established that "'arbitration is poorly suited to the higher stakes of class litigation,'" the arbitrator should not entertain a group FLSA pay claim, he dispatched it easily. In the arbitrator's view, *Concepcion* provides no "basis upon which a 'group of employees' portal dispute grievance . . . [can be] determined not to be arbitrable." *Federal Bureau of Prisons*, 135 LA 1215 (Heekin, Arb. 2015).

The arbitrator's judgment is beyond dispute. *Amicus* submits that the application of *Concepcion*'s rationale to the cases before the Court is negated by decades of experience.[8]

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[8] As the Ninth Circuit put it,

> Arbitration between groups of employees and their employers is commonplace in the labor context. It would

III. Collective Employment Arbitration is Indistinguishable From Collective Labor Arbitration in Terms of Informality, Simplicity, and Flexibility

The manner of dealing with collective claims under a collective bargaining agreement's arbitration provision and of collective claims under an employer arbitration policy is, for all practical purposes, comparable in terms of scope of discovery, nature of the evidence, control of the process by the arbitrator, authority to award statutory remedies, and the like. The only structural difference between the two is in the character of representation. Whether that difference is meaningful is taken up below. But first, a comparison of how the two systems operate can be displayed graphically.

> no doubt surprise many employers to learn that individual proceedings are a "fundamental" attribute of workplace arbitration.

Morris v. Ernst & Young, LLP, 834 F.3d 975, 989 (9th Cir. 2016) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), where the rules at issue allowed for group proceedings).

Collective Labor and Collective Employment Arbitration Compared

	Collective Labor Arbitration	Collective Employment Arbitration
Representation	Legal counsel or other representative of the union for it and any named claimants and all others who are determined by the arbitrator, after hearing, to have suffered the same wrong	Legal counsel or other representative for the named claimants[a] and all others who join them and are determined by the arbitrator, after hearing, to have suffered the same wrong
Discovery	All relevant information in the employer's possession including information regarding potential claimants[b]	Same[c]
Compliance with Demand	Unfair labor practice[d] or by arbitral subpoena[e]	Arbitral subpoena[f]

Presentation of Evidence	The proceeding is informal. Judicial rules of evidence need not be applied: the probative rule is merely one of relevance[g]	Same[h]
Remedy	All due by contract or law[i]	Same[j]

a. Am. Arb. Ass'n, Employment Arbitration Rules No. 19 (2009) ("Any party may be represented by counsel or other authorized representatives.").

b. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); Gorman & Finkin, LABOR LAW, *supra* § 20.4 (reciting authority).

c. Am. Arb. Ass'n, Employment Arbitration Rules No. 9 (2009):

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

d. *NLRB v. Acme Indus. Co.*, *supra*, *n.b.*

e. Am. Arb. Ass'n, Labor Arbitration Rules No. 27 (2013).

f. Am. Arb. Ass'n, Employment Arbitration Rules No. 30 (2009).

g. Am. Arb. Ass'n, Labor Arbitration Rules No. 27 (2013) ("The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.").

h. Am. Arb. Ass'n, Employment Arbitration Rules No. 30 (2009) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute.").

i. THE COMMON LAW OF THE WORKPLACE, *supra*, §§ 10.1, 10.5. In labor arbitration, whether the award determines the issue for a future case is for the arbitrator in that case to decide. *W.R. Grace & Co. v. Local 750, Rubber Workers*, 461 U.S. 757 (1983). *See generally*, THE COMMON LAW OF THE WORKPLACE § 1.91, *supra*.

j. Am. Arb. Ass'n, Employment Arbitration Rules No. 39(d) (2013). In employment arbitration, the award binds those who have joined the action. Employees or former employees who have chosen not to join the group could not be bound by the award.

The question of whether the difference in representation – whether a union or employee group representative – affects the simplicity, informality, and flexibility of the process has two aspects; one obvious, the other hypothetical. First, the obvious. Because the Union is already the exclusive representative of all

employees governed by the collective agreement regardless of Union membership, the Union has already been authorized to represent all employees who are potentially affected by the alleged wrong. Commonly, their claim would be presented in arbitration by legal counsel of the Union's choosing. In the non-union setting, the group of employees would need to select a representative to present their common claim, presumably by legal counsel of their choosing. This distinction has no impact on the adjudicative process. In labor arbitration, the Union acts through its chosen legal representative. So, too, does the group in employment arbitration.

Given the liberality of discovery in both settings, the union's representative in unionized employment and the legal representative of the group in the non-unionized setting are entitled to the names and other relevant information of those potentially affected by the challenged policy or decision. In the unionized setting, this permits the identification of those who might have suffered the common wrong and whose claims can be advanced as part of the group. In the non-unionized setting, the representative can identify those who might have suffered the common wrong and who might care to join the group in making the common claim. (Those who choose not to join would not be party to the proceeding.) The procedure is no more burdensome to non-unionized employers than the Union's exercise of its right to the same information for the same purpose in the unionized setting.

Second, the hypothetical. Because the representative of the group in the non-unionized setting is not an exclusive representative of all employees who could be potential claimants, it is hypothetically possible that some similarly situated employees might choose to bring their claims in concert with other employees or even singly. Were that hypothetical to materialize the employer would face more than one, and, possibly, conflicting claims regarding the underlying conduct. However, conflicts can also arise in the unionized setting where different unions under different contracts might demand arbitration over the same claim, for example, to the assignment of contested work. In such cases, the courts, "utilizing creative contract construction, have directed all parties to undertake tripartite arbitration." Gorman & Finkin, *supra* § 13.3 at p. 446 (citing authority). *See also* Catherine Fisk, *Managing Multiple Employment Arbitration Cases with Class Action Waivers in* PROCEEDINGS OF THE SIXTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 207, 210-12 (Katherine Thomson ed. 2016) (discussing Rule 6(e) of the JAMS Employment Arbitration Rules providing for the consolidation of claims; no parallel provision appears in the American Arbitration Association's Employment Arbitration Rules).

Suffice it to say, the hypothetical burden on an employer confronting two or more group claims over the same issue positively pales beside the prospect of a multiplicity of repetitive individual claims necessitated by the blanket prohibition of any collective arbitration whatsoever. This is taken up in Section IV, *infra*.

IV. The Preclusion of Collective Claims Invites the "Procedural Morass" of a Multiplicity of Repetitive Individual Claims

Under the policies at issue here two or more workers who have suffered a common legal wrong are prohibited from challenging that wrong in common. If they are to claim their legal due they are required do so only individually. Were that to occur, employers imposing such a prohibition on group challenges would face the prospect of a multiplicity of bilateral arbitrations, each subject separately to discovery of the same documents, depositions of the same managers, presentation of oral testimony on the same practice or decisions made by same people, subject to the same arguments as to events and to the credibility of testimony regarding them, no matter how cumulative or repetitive in the aggregate. Inexorably, this would be the case if each of these aggrieved employees were to pursue a claim. As no employee would be a party to any other employee's action, each would make his or her case afresh. Were a large number who claim to have suffered the same wrong to bring individual arbitrations – all workers of African descent or all women workers who have been denied promotion by an arguably discriminatory test, all older workers disqualified by a novel job requirement that arguably has a discriminatory impact on grounds of age, those of the company's employees allegedly denied donning and doffing or overtime pay – employers *would* face a procedural morass: line and human resource managers would be

required to devote weeks, perhaps months, to repetitive discovery and testimony in as many individual arbitrations as there are claimants.

The benefit for the efficiency of any dispute resolution system in allowing collective claims to be brought in a single proceeding is echoed in the reciprocal benefit to employers in the expeditious resolution of the issue. The FLSA is illustrative. The rationale for Congress' providing for a collective action under 29 U.S.C. § 216(b) was recently summarized by the Third Circuit, reiterating the continuing vitality of this Court's teaching of a quarter century ago:

> By permitting employees to proceed collectively, the FLSA provides employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive. It also yields efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 [1989].

Halle v. West Penn Allegheny Health Sys., Inc., 842 F.3d 215, 223 (3d Cir. 2016). That efficiency manifestly benefits employers as well.

Because the efficiency of collective disposition for employers as well as employees and for the adjudicative process is so clear, the obvious next question cannot be ignored: Why would an employer preclude

collective arbitration? Empirical research sheds light on this question.

"Proponents of employment arbitration proclaim its accessibility, particularly for claimants unable to find representation in courts of law," a leading empirical study observes.[9] But, as it and another empirical study confirmed, "the idea that arbitration invites meager claims is hard to square with the [statistical] reality that few employees accept the invitation."[10] It is difficult, to put it mildly, for employees to secure legal representation for the low stakes forum of bilateral arbitration.[11] An employee who learns that her recorded time has been "shaved" by her supervisor's systematic manipulation of the company's electronic timekeeping system and who is restricted to a bilateral arbitration would be hard pressed to retain legal counsel and the forensic expertise required to prove that that was so.[12] She might also have a well-grounded fear of retaliation were she to complain – not necessarily

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[9] Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR Rev. 1010, 1037 (2015).

[10] David Horton & Andrea Chandrasekher, *Employment Arbitration After the Revolution*, 65 Depaul L. Rev. 457, 471 (2016).

[11] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014).

[12] Elizabeth Tippett, Charlotte Alexander & Zev Eigen, *When Timekeeping Software Undermines Compliance*, 19 Yale J. L. & Tech. 1, 23 (2017) ("Software that provides supervisors with unchecked discretion to edit employee time is problematic from a behavioral compliance standpoint because supervisors have a strong incentive to limit payroll costs by shaving employee time.").

the blunt instrument of dismissal, but the assignment of reduced or inconvenient hours, to more distasteful duties and the like. If, however, what had been done to the worker was the result of an employer practice affecting many of her co-workers, and if these co-workers can combine to present their claim in a single action they would be far more likely to be able to secure representation. Whence the allowance for those affected to pool their claims. *Hoffman-LaRoche Inc. v. Sperling*, *supra*.

Consequently, the logic of collective claim preclusion is necessarily this: Even though a collective disposition would be far more efficient and cost effective than a multiplicity of bilateral arbitrations, employers can benefit because of the predictively low likelihood that any significant number of separate claims would ever be brought.

To stay with wage and hour law for illustrative purposes, abundant research shows that often wage violation is not a one-off act of exploitation, but a business model. As a study of low wage workers in Chicago concluded, "With a low ratio of [labor] inspectors per establishment and minimal penalties for noncompliance, evading the law is not a covert competitive tactic in service industries – it's a basic, uncontested business practice on public display." Marc Doussard, DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET 233 (2013). For all too many employers,

the risk of wage theft is a risk worth taking.[13] Consequently, for those employers the risk of a multiplicity of repetitive individual arbitrations created by the prohibition of collective claims is also a risk worth taking, based on the practical difficulty for employees seeking counsel and the low likelihood of their being able to secure counsel for bilateral arbitrations over small sums.[14] In that way, the employer can systematically avoid legal accountability at large and avoid any redress at all in many individual instances.[15]

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[13] The documentation is substantial. The most recent and comprehensive study on a national basis is by David Cooper & Teresa Kroeger, Employers steal billions from workers' paychecks each year, Economic Policy Institute Report (May 10, 2017). Notable also are studies in major cities. Ruth Milkman, Ana Luz González & Peter Ikeler, *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 Indus. Rel. J. 378 (2012); Annette Bernhardt, Michael W. Spiller & Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles, and New York City*, 91 Soc. Forces 725, 737 (2013).

[14] In addition, the arbitral listing agency may require the employer to deposit in advance the estimated arbitrator's fee. If a large number of individual claims are presented, this may amount to a considerable sum, *e.g.*, between $500,000 and $1,000,000 were forty employees individually to pursue arbitration. Martin Malin, *The Employment Decisions of the Supreme Court 2012-13 Term*, 29 ABA J. Lab. & Emp. L. 203, 213-14 (2014) (discussing just such a case). Though the requirement might conduce toward the settlement of multiple cases, the very prospect of such amounts having to be paid up front evidences the employer's disbelief that numerous identical claims will ever be pursued.

[15] There is yet another way employers benefit from a prohibition on collective claims. Unlike judicial proceedings, arbitration is confidential. The obligation is set out in the rules of well-accepted arbitral selection agencies as well in *amicus* Academy's

With this in mind, in 2009, *amicus* National Academy of Arbitrators adopted a *Policy Statement on Employment Arbitration*. This statement assists arbitrators in deciding whether to accept appointment, explaining that "cases arising under an employer

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Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration § 2(c)(1) ("The arbitrator must treat all significant aspects of an arbitration proceeding as confidential unless all parties waive this requirement or applicable law permits or requires disclosure.").

Students of mandatory employment arbitration have noted that confidentiality is of benefit to employers as it allows the employer to argue each case afresh without having to deal with a prior award disadvantageous to it. Ariel Avgar, *et al.*, *Unions and ADR: The Relationship Between Labor Unions and Workplace Dispute Resolution in U.S. Corporations*, 28 Ohio St. J. Dispute Resol. 63, 89 (2013). This employer advantage takes on additional salience when it is joined with a prohibition on collective claims: confidentiality allows an employer to avoid harmful evidence introduced in one proceeding to be used in another presenting the same claim on the same facts. Catherine Fisk, *Managing Multiple Employment Arbitration Cases with Class Action Waivers*, *supra*. It is noteworthy that two of the employers before the Court have deemed it useful to address confidentiality specifically in their governing policies in addition to the general principle of confidentiality. **Epic Systems'** "Mutual Arbitration Agreement" provides that, "no decision by any arbitrator shall serve as precedent in other arbitrations except in a dispute between the same parties. . . ." 7th Cir. Case No. 15-2997, Doc. 12-2. **Ernst & Young's** "Common Ground Dispute Resolution Program" goes further:

> *All* aspects of Phase I [mediation] and Phase II [arbitration] including any award made, shall be confidential, except to the extent disclosure is required by law or applicable professional standards, or is necessary in a later proceeding between the parties.

9th Cir. Case No. 13-16599, Doc. Entry 12-3 (emphasis added).

promulgated arbitration plan require particular vigilance on the part of arbitrators to ensure procedural fairness *and* to protect the integrity and reputation of workplace arbitration." (Emphasis added.) Before accepting appointment, the arbitrator is advised to consider *inter alia*,

> Any restrictions on class or group actions to the extent these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, *or* hinder the vindication of the public purpose served by the particular claim. [Emphasis added.]

As the emphasized conjunctive and disjunctive respectively make clear, the Academy's concern is not only for the arbitrator's ability to do justice in the individual case, but also whether his or her participation would lend legitimacy to a policy that, by precluding collective claims, hobbles the realization of workplace justice. In the Academy's experience, that likelihood cannot be disregarded.

CONCLUSION

Unlike *Concepcion* and *Italian Colors*, the cases before the Court arise out of the workplace. There is no equivalent to the Norris-LaGuardia Act or the National Labor Relations Act in the consumer or commercial setting. The employment relationship has long been a subject of public and legislative concern going

back well over a century including the right of employees to act in concert to secure rights and benefits. John R. Commons & John B. Andrews, PRINCIPLES OF LABOR LEGISLATION (1916).

Whence the question: Does the National Labor Relations Act and the Norris-LaGuardia Act it builds upon allow employers to atomize their workers, to forbid them from seeking the protections of employment law by acting in concert to remedy claimed workplace violations in the only adjudicative forum available to them? The answer necessarily draws on the text, history, and policy of these laws, but it cannot be fully addressed without answering the implicit underlying question: why would an employer impose a restriction disallowing even two coworkers suffering the same wrong from presenting a common claim together?

Two reasons emerge straightaway: one stated, one not. The stated reason is that the benefits to employers and employees of access to a process at once informal, flexible, simple, and expeditious would be lost were more than a single employee to be allowed to proceed to arbitration. As *amicus* Academy has shown, that reason is negated by more than a half century's experience in labor arbitration. For all practical purposes, the two – collective labor arbitration and collective individual arbitration – are identical in terms of informality, simplicity, flexibility and expedition.

The second, albeit unstated reason is that a prohibition on the making of common cause works systematically to abet the avoidance of legal accountability.

Note that the preclusion of collective claims means that numerous employees suffering a common wrong could well bring as many separate claims individually. Should that possibility mature, the employer could face a morass of repetitive proceedings. Consequently, the employer's decision to prohibit group or joint claims is necessarily premised on an assumption that such a multiplicity of separate arbitrations over the same alleged wrong will rarely if ever be brought. In other words, that the employer's risk of facing a "procedural morass" is a risk it is willing to take.

Were the Court to find the preclusion of collective actions to be unlawful as a matter of labor law, one of three results would obtain. Employers could continue to insist on bilateral arbitration, but only for individual claims. In that case, collective claims would be heard in court. Alternatively, employer policy could provide for Rule 23-like arbitration procedures. In fact, such voluntary provision is contemplated by the rules of the major arbitration providers.[16] Or, the employer could simply excise the preclusion of collective claims. This would allow claims to be heard in arbitration on behalf of those who choose to be represented in concert. If the Nation's experience with labor arbitration is a

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[16] Am. Arb. Ass'n, Supplementary Rules for Class Arbitrations (Jan. 1, 2010); JAMS, Class Action Procedures (May 1, 2009).

sound guide – and it is – that result would entail no loss of informality, flexibility, simplicity, or expedition.

Respectfully submitted,

Of Counsel
KATHLEEN MILLER
NAA President
350 Ardmore Avenue
Ardmore, PA 19003

STEPHEN F. BEFORT
University of Minnesota
Law School
229 19th Avenue South
Minneapolis, MN 55455

MATTHEW W. FINKIN
Counsel of Record
NATIONAL ACADEMY OF
ARBITRATORS
University of Illinois
College of Law
504 East Pennsylvania
Avenue
Champaign, IL 61820
(217) 333-3884

August 2017

ECORD
AND
BRIEFS

Nos. 16-285, 16-300 &16-307

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS EPIC SYSTEMS CORPORATION, ERNST & YOUNG, LLP ET AL., AND RESPONDENT MURPHY OIL USA, INC.

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

LINDA E. KELLY
PATRICK N. FORREST
LELAND P FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001
Counsel for the National Association of Manufacturers

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201.2931
(214) 880-8100
eberbarie@littler.com

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS EPIC SYSTEMS CORPORATION, ERNST & YOUNG, LLP ET AL., AND RESPONDENT MURPHY OIL USA, INC.

INTEREST OF AMICI CURIAE

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of private-sector research and development in the nation. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The Coalition for a Democratic Workplace ("CDW") comprises over 600 organizations representing millions of employers nationwide in nearly every industry. CDW provides a collective voice to its membership on issues related to labor law reform.[1]

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, amici curiae states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici curiae, their members, or their counsel, have made a monetary contribution to this brief's preparation or submission. *See* S. Ct. Rule 37.6

The NAM and CDW advocate on behalf of their members on a range of matters, including labor and employment issues. They also file briefs as amici curiae in cases of importance, such as these. The organizations are made up of a vast number of employers with operations across the United States that utilize pre-dispute arbitration agreements with class action waivers[2] in the employment context.

The National Labor Relations Board ("NLRB" or "Board") has reversed course from the position held by its General Counsel as recently as 2010 and now maintains that arbitration agreements with class waivers, and which are governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), violate employees' rights to engage in protected, concerted activity under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) ("*D.R. Horton*"); *see also* 29 U.S.C. § 157. In taking this position, the NLRB has not acted as an administrative agency ruling on areas within its expertise; instead, it has interpreted statutes outside of its expertise and effectuated an anti-arbitration shift.

The U.S. Courts of Appeals for the Seventh, Ninth, and now Sixth Circuits have mistakenly deferred to the NLRB and held that arbitration agreements with class waivers violate the NLRA. *See Lewis v. Epic*

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[2] Amici use the term "class action waiver" or "class waiver" throughout this brief as a short hand way of describing a provision in an arbitration agreement that prohibits class actions under Rule 23 of the Federal Rules of Civil Procedure, collective actions under 29 U.S.C. § 216(b), and any other type of aggregate litigation allowed under federal or state procedure. The purpose of class waivers is to allow parties to engage only in bilateral arbitration.

Systems, 823 F.3d 1147 (7th Cir. 2016); *Morris et al. v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017). But the Fifth Circuit has instead correctly rejected the NLRB's novel theory on class waivers. *See Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). Amici curiae have an interest in ensuring arbitration agreements entered into between employers and employees are enforced according to their terms, as required by the FAA. The NAM and CDW also have an interest in ensuring the NLRB avoids ruling on issues outside of its congressionally–defined realm. The NAM and CDW also want to preserve the benefits of bilateral-arbitration—arbitration between the two parties to an arbitration agreement only—to resolve workplace disputes.

SUMMARY OF ARGUMENT

The NLRB deserves no deference in its interpretation of the FAA, because the FAA is outside the NLRB's congressionally–mandated role. For over seventy years, this Court has rejected the NLRB's forays into areas beyond its responsibility, and it should do so again now. *See, e.g., Southern. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

Further, the NLRB's interpretation of statutes beyond the NLRA is especially troublesome because of the NLRB's widely recognized inconsistent decisions. *See, e.g., Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d

290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias'") and other cases noted *infra*. Also, by presenting a level of hostility to bilateral arbitration reminiscent of ancient judicial attitudes the FAA was designed to overcome, the NLRB has disregarded both Congress's objective in enacting the FAA and decades of FAA jurisprudence. The NLRB's position on class waivers brings the same concerns as courts and scholars have noted with the NLRB's positions in the past. The NLRB's well-noted inconsistencies, on display here again, heavily favor this Court rejecting the NLRB's reasoning on class waivers and presumption to go beyond its statutory role. Employers and employees should be able to rely on, and the NLRB must be required to accept, this Court's position in favor of bilateral arbitration and enforcement of arbitration agreements by their terms as required by the FAA.

ARGUMENT

I. The NLRB does not deserve deference when it interprets the FAA.

The NLRB deserves no deference on the class waiver question. The NLRB's decision in *D.R. Horton* relies on the Board's single-minded interpretation of the NLRA, without regard for the objectives of the FAA. The NLRB's purpose is circumscribed by the NLRA: to prevent unfair labor practices and protect representation elections. *See* 29 U.S.C. §§ 153, 159 & 160. Congress did not task the NLRB with interpreting statutes outside of the NLRA, and the NLRB should not do so.

Even within its realm of expertise—contractual agreements between employers and unions—Congress did not designate the NLRB as the proper forum to enforce or invalidate contractual provisions. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 511 (1962) (noting that Congress made "collective bargaining agreements enforceable only in the courts" when enacting 29 U.S.C. § 185); *see also* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42. ("Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."). Congress's decision not to give the NLRB the power to enforce or invalidate collective bargaining agreements, leads to the conclusion that the NLRB should not have the power to enforce or invalidate contracts in an area outside of its expertise.

The NLRB's meddling with contractual agreements is the very conduct the FAA was designed to prevent. The FAA was enacted in 1925 specifically to ensure arbitration agreements received the treatment due to them as binding contractual agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (describing that the FAA was enacted to reverse the "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.") The NLRB's invasion of the FAA is especially troubling because it has upended the purpose of the FAA and the benefits of bilateral arbitration. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

When the NLRB has stepped outside of its role by "single-mindedly" interpreting the NLRA in the past,

this Court has not hesitated to curtail its activities. *See, e.g., Southern S.S. Co.*, 316 U.S. at 47. The Court first found fault with the NLRB's overreach in *Southern S.S. Co.* when it rejected the NLRB's order to reinstate employees, after the NLRB found that employees striking on a ship had not committed the crime of mutiny as defined in 18 U.S.C. §§ 483-484. *See Southern S.S. Co.*, 316 U.S. at 48-49. And again, when the Board attempted to interpret the Bankruptcy Code, this Court concluded the Board's interpretation deserved no deference. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 529 fn. 9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."). More recently, when the Board awarded back pay to individuals who lacked work authorization in the United States, this Court again rebuked the agency for frustrating the purpose of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a *et seq.* ("IRCA"). *See Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 151 (2002) ("We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.") Although the NLRB has "discretion to fashion remedies when dealing only with the NLRA," it does not deserve the same deference when frustrating other laws. *See id.* at 151-52.

The NLRB's reasoning, relegating the FAA to second-class status, adopted by the Sixth, Seventh and Ninth Circuits, does not deserve deference. This Court should once again curb the NLRB's overreach and reject its position on class waivers.

II. The NLRB's attack on bilateral arbitration does not deserve deference.

The NLRB's position on class waivers is not only troubling because it is based on the NLRB's interpretation of a statute outside of its province; the NLRB's current position on class waivers is also seemingly part of yet another broader policy-driven shift. Board Member Miscimarra, in another context, characterized this shift in policy as a "hostility and suspicion towards arbitration that Congress repudiated and the FAA was enacted to reverse almost a century ago." *Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB No. 132, slip op. 23 (2014) (Miscimarra, dissenting). While all agencies have some degree of susceptibility to advance their own objectives despite other valid legislative considerations, the NLRB has deserved special attention.[3] And, as the Seventh Circuit noted regarding the NLRB: "An administrative agency, like any other first-line tribunal, earns-or forfeits-deferential judicial review by its performance." *Children's Habilitation Ctr., Inc. v. N.L.R.B.*, 887 F.2d 130, 132 (7th Cir. 1989). The NLRB's historically inconsistent positions should therefore temper the judicial deference it deserves.

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[3] *See, e.g.*, Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 Berkeley J. Emp. & Lab. L. 223, 225 (2016) ("The NLRB is not the only independent agency accused of political bias but it is often cited as the poster child for partisanship in agency decision-making."); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L.J. 2013, 2020 (2009) ("Those familiar with the Board know that it changes the rules depending on which party occupies the White House. Eight years allows a Board to remake the law fairly significantly, as the Board issues hundreds of decisions each year.")

For example, the NLRB has drawn the rebuke of the Circuit Courts with its "supervisor" test. *See, e.g., Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 492 (2d Cir. 1997) ("The Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area."); *Beverly Enters, Va., Inc. v. NLRB*, 165 F.3d 290, 296 (4th Cir. 1999) (noting that the Board's unexplained shifts regarding the supervisory status of nurses "has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged test of the Act but on a 'policy bias'"); *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) ("More important than the verbal niceties in the standard of review is judicial impatience with the Board's well-attested manipulativeness in the interpretation of the statutory test for 'supervisor.'").[4]

The Board's inconsistent approach is also evident in its new hostility to arbitration. Since its 1955 decision in *Spielberg Mfg.*, the NLRB has facilitated the process of "deferral" where unfair labor practice charges are resolved through the grievance and arbitration process of a bargaining agreement between an employer and union. *See Spielberg Mfg.*, 112 NLRB 1080 (1955). The Board's deferential treatment of arbitration

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[4] Even after prior rebukes, the NLRB is again using vague standards to achieve policy goals. For example, the NLRB's current *Lutheran Heritage* standard, which prohibits employer policies, such as a prohibition on foul language, when the policy may be "reasonably construed" by an employee to chill Section 7 rights has led to confusion. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Current Board Chairman Miscimarra even recently noted the Board's "reasonably construe" standard "has led to arbitrary results." *William Beaumont Hosp.*, 363 NLRB 162, slip op. 18 (Apr. 13, 2016).

awards and the arbitration process continued virtually unchanged for nearly sixty years, until the Board's decision in *Babcock & Wilcox*.[5] With no evidence that the previous deferral provisions were deficient, the NLRB heightened the deferral requirements, making arbitration of disputes more unlikely and showing "a deep-seated hostility towards arbitration that Congress rejected when it adopted the Federal Arbitration Act (in 1925) and again when it articulated a strong presumption favoring arbitration when adopting (in 1947) Section 203(d) of the LMRA." *Babcock & Wilcox*, 361 NLRB No. 132, slip op. 23 (Miscimarra, dissenting).

The Board's drastic turn on the class waiver issue is easy to trace; only 18 months before *D.R. Horton*, the NLRB's General Counsel issued a memorandum which directly contradicted the NLRB's eventual position in *D.R. Horton*.[6] *See* NLRB, Gen. Counsel Memorandum No. 10-06 (June 16, 2010). The NLRB's General Counsel stated "an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration." *Id.* at 2. The General Counsel even advised "an employer may lawfully seek to have a class action complaint dismissed" when an employee has signed a class waiver. *Id.*

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[5] One minor change to the deferral standard came with *Olin Corp.*, 268 NLRB 573 (1984) where the Board added the requirement that the arbitrator be presented with the general facts relevant to resolving the unfair labor practice for deferral to occur.

[6] Notably, the Acting Solicitor General requested an extension to the briefing schedule in the current proceedings because the Acting Solicitor General was reviewing the NLRB's novel theory on class waivers.

Now the Board has taken an entirely different position, attempting to elevate its current policy concerns over the FAA. The Board's newfound position on the enforceability of class waivers in FAA governed arbitration agreements is irreconcilable with its former General Counsel's previous policy statement on class waivers, Congress's objectives in enacting the FAA, and this Court's FAA jurisprudence. The Sixth, Seventh and Ninth Circuits were therefore wrong to adopt it.

CONCLUSION

The NLRB deserves no deference in its treatment of the FAA because the NLRB has single-mindedly interpreted the NLRA while rejecting Congress's intention in enacting the FAA. Furthermore, the NLRB's constantly-changing and inconsistent positions in advancing its own policy concerns undermine any deference afforded to it on the class waiver issue.

Respectfully submitted,

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Boulevard,
Suite 600
Walnut Creek, CA 94597

MICHAEL J. LOTITO
LITTLER MENDELSON, P.C.
333 Bush Street
34th Floor
San Francisco, CA 94104

LINDA E. KELLY
PATRICK N. FORREST
LELAND P FROST
733 10th Street, NW,
Suite 700
Washington, DC 20001

Counsel for the National Association of Manufacturers

EDWARD F. BERBARIE
Counsel of Record
ROBERT F. FRIEDMAN
SEAN M. MCCRORY
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500, Lock Box 116
Dallas, TX 75201.2931
(214) 880-8100
eberbarie@littler.com

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 16 2017
OFFICE OF THE CLERK

NOS. 16-285, 16-300, 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURTS OF APPEALS FOR
THE FIFTH, SEVENTH, AND NINTH CIRCUITS

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE EMPLOYER PARTIES

Counsel for Amicus Curiae
Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street,
Boston, Massachusetts 02111-2504
(617) 695-3660
benrobbins@nelfonline.org

June 16, 2017

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on whether, in the case of an arbitration agreement requiring employees to arbitrate on an individual basis only, the mandate to enforce such an agreement under § 2 of the Federal Arbitration Act (FAA), is overridden by § 7 of the National Labor Relations Act (NLRA), which protects an employee's "right . . . to engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Rule 37.3(a), NELF has filed with this brief a letter of consent from counsel for the NLRB, which is the petitioner in *NLRB v. Murphy Oil*, Case No. 16-307. All of the remaining parties in these consolidated cases have filed with the Court blanket letters of consent to the filing of amicus briefs.

NELF is committed to upholding the FAA's mandate to enforce class action waivers contained in valid arbitration agreements. This serves the FAA's purpose to enforce arbitration agreements according to their terms so as to facilitate streamlined proceedings. NELF is also committed to upholding the FAA's mandate with respect to the arbitration of federal statutory claims, unless the relevant statute displaces the FAA by providing a nonwaivable right to pursue group legal action. When the federal statute at issue, here the NLRA, does not announce any such substantive right, the class action waiver should be enforced under the FAA.

In addition to this amicus brief, NELF has filed many other related amicus briefs in this Court, arguing for the enforcement of arbitration agreements according to their terms under the FAA.[2]

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

At issue is whether the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements is displaced by § 7 of the NLRA, which grants employees "the right . . . to engage in other concerted activities for . . . mutual aid or protection." Nowhere does the text,

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[2] *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

purpose, or history of the NLRA clearly establish that employees have a substantive right to join together and sue their employer. Therefore, the waivers should be enforced.

The employees' underlying claim is a *legal* dispute over their qualification to receive overtime payments, as provided by the FLSA and state wage law. This is not an "industrial dispute" over a *negotiable* "difference as to wages, hours, or other working conditions," as Congress expressly intended in the NLRA's statement of purpose. The NRLA was clearly intended to resolve contractual disputes over terms of employment, by protecting employees' rights to organize in the workplace and bargain collectively with their employers. This has nothing to do with the resolution of a legal dispute over rights of employment that are guaranteed by other statutes. Such rights are not negotiated in the workplace. Therefore, the underlying statutory claims here appear to fall outside the NLRA's intended scope and should not be enforceable under the NLRA.

The NLRA was intended to achieve industrial peace by promoting group negotiation and compromise in the workplace. This purpose is incompatible with group litigation in court or in arbitration. Class actions are inherently coercive, not cooperative, and they often create the risk of "in terrorem" settlements. Group legal action is not the "strength in numbers" that Congress had in mind when it declared its intent to protect employees' "full freedom of association" for the purpose of "negotiating" and "bargaining" with their employers.

Section 7 of the NLRA enumerates specific protected concerted activities, followed by the catchall phrase "other concerted activities." Under the rule of *ejusdem generis* ("of the same kind"), "other concerted activities" should be defined and limited by the specific concerted activities that precede it. Those specific concerted activities identify certain formal ways in which employees can organize in the workplace and address working conditions with their employer. "Other concerted activities," then, should only protect various similar ways in which employees can join together in the workplace, but without having to form a union or engage in collective bargaining. Those activities would have nothing to do with group legal action. To interpret the phrase so broadly would render § 7's list of concerted activities superfluous.

Congress chose the phrase "concerted *activities*" in § 7, not "concerted action." When Congress wants to protect or proscribe certain conduct, it generally uses the word "activity," as it did here. But when Congress wants to create a right to sue, it generally uses the word "action," whether by itself or in such phrases as "civil action" or "cause of action." Similarly, Congress did not create a private right of action in the NLRA and instead delegated enforcement powers to the NRLB. It is unlikely, then, that "other concerted activities" was intended to include group legal action by employees.

The NLRA should be understood in its historical context. Before the NLRA's passage, any efforts by employees to act in concert, in and around

the workplace, were treated as illegal conspiracies or combinations in restraint of trade. In the labor-related statutes preceding the NLRA, Congress used the phrases "in concert" and "concerted activities" to begin removing the legal barriers that had prevented workers from joining forces in the workplace. In a clean break from the past, the NLRA reversed the historical meaning of "concerted activities"--i.e., legally prohibited group conduct--to legally protected group conduct. But this had nothing to do with creating a new right of collective legal action against employers.

Nothing in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggests that the NLRA creates a substantive right of group legal action that displaces the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements. *Eastex* did not involve the FAA, did not involve a dispute over the NLRA's "other concerted activities" language, and it did not involve any judicial action taken by employees. Instead, that case decided the unrelated issue whether the *purpose* of certain concerted activity--the distribution of a union newsletter in the workplace--satisfied the NLRA's "other mutual aid or protection" requirement. The Court held that the concerted workplace activity at issue served a protected purpose, even though the newsletter urged employees to take political action outside the workplace, concerning issues affecting workers generally. The Court based its decision largely on the NLRA's broad definition of "employee," which includes the employees of other employers. None of this bears on the issue here.

ARGUMENT

I. THE NLRA DOES NOT DISPLACE THE FAA'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

At issue in these consolidated cases is whether, in the case of an arbitration agreement that requires employees to arbitrate on an individual basis only, the mandate to enforce the agreement under § 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (FAA), is overridden by § 7 of the National Labor Relations Act (NLRA), which protects an employee's "right . . . to engage in other concerted activities for . . . other mutual aid or protection . . . ." 29 U.S.C. § 157.[3] The NLRA also provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] . . . ." 29 U.S.C. § 158(a)(1).

The employees here each signed such a pre-dispute arbitration agreement. They now allege that they have been wrongfully denied overtime

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[3] Section 7 of the NLRA provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

payments under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA), and cognate state wage laws. Notwithstanding their arbitration agreements, the employees filed putative class and collective actions in federal court, invoking both Fed. R. Civ. P. 23 and the FLSA's mechanism for a collective (opt-in) action.[4]

Notably, the Court has already decided that neither Rule 23 nor the FLSA's collective action mechanism overrides the FAA's mandate to enforce class action waivers in valid arbitration agreements.[5] Nonetheless, the employees and the NLRB, which is also a party to these consolidated cases, argue that employees have a nonwaivable right to pursue group legal action against their employers, because it is a form of "other concerted activity" that is protected under § 7 of the NLRA.

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[4] 29 U.S.C. § 216(b) ("An action to recover [for] liability . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.")

[5] *See American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights."); *id.* at 2311 ("In *Gilmer* [*v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)] . . . , we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act[,] [which incorporates the FLSA's procedures at 29 U.S.C. § 626(b)] expressly permitted collective actions.").

A. The Starting Point Is The FAA, Which Requires The Challenging Party To Show That The NLRA Clearly Provides Employees With The Substantive Right To Pursue Group Legal Action Against Their Employer.

"The [FAA] provides the starting point for answering the questions raised in this case." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (first considering FAA's mandate and then concluding that FAA requires enforcement of agreement to arbitrate disputes under Securities Exchange Act of 1934 and civil RICO statute). And the FAA requires the enforcement of a class action waiver that is contained in a valid arbitration agreement. This is because "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Invalidating a class action waiver "[r]equir[es] the availability of classwide arbitration[.] [This, in turn,] interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.*

The FAA's mandate to enforce class action waivers applies equally in "claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a *contrary congressional command*." *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (emphasis added) (citation and internal quotation marks omitted). The burden falls on the

party opposing the class action waiver (here, the employees and the NLRB) to show that the NLRA displaces the FAA's mandate to enforce the waiver. *See McMahon*, 482 U.S. at 227 ("The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of [the right to pursue group legal action] . . . for the statutory rights at issue.").

To satisfy their burden, the employees and the NLRB must show that "such an intent [to provide a nonwaivable right to pursue group legal action] will be deducible from [the NLRA's] text or legislative history, or from an inherent conflict between arbitration and the [NLRA's] underlying purposes." *McMahon*, 482 U.S. at 227 (citation and internal quotation marks omitted). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (discussing same). And if this inquiry raises any doubts on the matter, "we resolve doubts in favor of arbitration." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring). *See also Gilmer*, 500 U.S. at 26 ("Throughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.") (citation and internal quotation marks omitted).

To displace the FAA's mandate, then, it is not enough for the parties to argue that the isolated residual phrase "other concerted activities," in § 7 of the NLRA, *could* be interpreted to include group legal action. Instead, the employees and the NLRB must show that the full text, the purpose, or the history of the NLRA *requires* such an interpretation.

Whether the employees and the NLRB have met their burden is an issue of *inter*-statutory interpretation that should be decided by this Court, not the NLRB. At stake is the resolution of a potential conflict between two federal statutes (the FAA and the NLRA), as opposed to the resolution of a purely internal issue of statutory interpretation under the NLRA, which would have no consequences on another federal statute. "[W]e have accordingly never deferred to the [NLRB's] remedial preferences where such preferences *potentially trench upon federal statutes and policies unrelated to the NLRA* . . . ." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (emphasis added). *See also Dorsey v. United States*, 567 U.S. 260, 291 (2012) ("[W]hen two statutes are capable of co-existence, it is the *duty of the courts*, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (emphasis added) (citation and internal quotation marks omitted); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel.").

B. The NLRA Was Intended To Resolve Workplace "Industrial Disputes" Over Negotiable "Terms And Conditions Of Employment," Not Legal Disputes Over Rights Of Employment That Are Guaranteed By Other Statutes.

In their underlying dispute, the employees allege a violation of their statutory right to receive

overtime payments, as provided by the FLSA and cognate state wage laws. This is a *legal* dispute over their qualification to receive wages in an amount that is guaranteed by statutes other than the NLRA. This is not an "industrial dispute" over a *negotiable* "difference as to wages, hours, or other working conditions," as Congress intended those words in the NLRA. 29 U.S.C. § 151 ("Findings and Declaration of Policy"). *See also McMahon*, 482 U.S. at 227 (federal statute's underlying purpose is a key factor in determining whether that statute displaces FAA).

In particular, the NLRA's stated purpose is to promote "the friendly *adjustment* of industrial disputes arising out of *differences* as to wages, hours, or other working conditions," which is achieved "by protecting the exercise by workers of full freedom of association" so that they may "*negotiat[e]* the terms and conditions of their employment" through "*collective bargaining*." 29 U.S.C. § 151 (emphasis added).

Clearly, the NRLA was intended to resolve contractual disputes over negotiable terms of employment, by protecting employees' rights to organize in the workplace and bargain collectively with their employers. This is "the friendly adjustment of industrial disputes" that Congress identified in § 1 of the NLRA.

But this bargaining process in the workplace has nothing to do with the resolution of a legal dispute over rights of employment that are guaranteed by other statutes. A statutorily fixed right of employment is not determined by

"negotiat[ion]," "adjustment," or "bargaining" between employees and their employer. 29 U.S.C. § 151. That statutory right is therefore not a negotiable "term" or "condition" of employment under § 1 of the NLRA. Instead, such a statutory right has already been "negotiated" by the legislature on behalf of all employees. The resolution of a legal dispute arising from a guaranteed statutory right appears to fall outside the NLRA's intended scope.

In short, the underlying claims here do not arise from contractual rights of employment that have been bargained for in the workplace. The claims should therefore not be enforceable under the NLRA.

C. Group Litigation Is Incompatible With The NLRA's Purpose Of Achieving Industrial Peace Through Group Negotiation In The Workplace.

It is unlikely that Congress intended the NLRA to apply to litigation of any kind, let alone group litigation, because "the underlying purpose of this statute is industrial peace," achieved through negotiation and compromise in the workplace. *Brooks v. NLRB*, 348 U.S. 96, 103 (1954). *See also Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is *industrial peace and stability*, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employers.") (emphasis added).

The NLRA was intended to protect employees' right of association in the *workplace*, not in a courtroom or in arbitration, so that employees could negotiate their differences with their employer, not litigate over them. *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at A General Theory of Section 7 Conduct*, 137 U. Pa. L. Rev. 1673, 1683, 1685 (1989) ("The purpose of the Wagner Act, and therefore the purpose of . . . section 7, was to bring *to the workplace* a legally protected right of association . . . [which] . . . would be comparable to the rights of freedom of speech and association the first amendment guaranteed to workers in their political lives.") (emphasis added); Robert A. Gorman and Matthew W. Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 343 (1981) (discussing NLRA's purpose to establish "civil rights *at the workplace*") (emphasis added).

Group litigation, then, is far removed from the NLRA's purpose of protecting group negotiation in the workplace. It is inherently coercive, and it is hardly the cooperative process that Congress had in mind to promote industrial peace. *See Morris, NLRB Protection in the Nonunion Workplace*, 137 U. Pa. L. Rev. at 1682 (discussing statement of Senator Wagner that NLRA was intended to establish "a cooperative relationship between workers and employers," achieved through "equality of bargaining power."). In particular, a class action is at odds with the NLRA's purposes because it creates "the risk of 'in terrorem' settlements," *Concepcion*, 563 U.S. at 350, due to the sheer size of the plaintiff class and

the potential damages at stake, quite apart from the merits of the underlying dispute. *See id.*

It is doubtful, then, that a class action is the "strength in numbers" that Congress had in mind when it declared its intent to protect employees' "full freedom of association" for the purpose of "negotiating" and "bargaining" their differences with their employer. 29 U.S.C. § 151. And "we resolve doubts in favor of arbitration." *CompuCredit*, 565 U.S. at 109.

D. Under The Rule of *Ejusdem Generis*, Section 7's Residual Phrase "Other Concerted Activities" Simply Means That Employees Have The Right To Join Together In The Workplace For A Common Cause, But Without Having To Form A Union Or Engage In Collective Bargaining.

In light of the NLRA's clear statement of purpose, it is already doubtful that § 7's "right . . . to engage in other concerted activities" would include group litigation. But that proposition becomes even more doubtful when the catchall phrase "other concerted activities" is interpreted properly in its immediate context, not in isolation from the rest of § 7. "[I]t is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word [or phrase] cannot be determined in isolation, but must be drawn from the context in which it is used . . . ." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (citation and internal quotation marks omitted).

In particular, § 7 enumerates specific concerted activities (self-organization; forming, joining or assisting labor unions; and collective bargaining) followed by the residual phrase "other concerted activities."[6] And "[i]t is a commonplace of statutory construction that the specific governs the general." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (citation and internal punctuation marks omitted). *See also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163 (2012) ("[T]he rule of *ejusdem generis* ["of the same kind"] should guide our interpretation of the catchall phrase, since it follows a list of specific items.").

And so the meaning of "other concerted activities" "should itself be controlled and defined by reference to the enumerated [concerted activities] which are recited just before it . . . ." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (§ 1 of FAA, which exempts "contracts of employment of seamen, railroad employees, or any *other* class of workers engaged in foreign or interstate commerce," applies only to other similar transportation workers) (emphasis added). Simply put, "other concerted activities" should only protect those concerted

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[6] Again, § 7 provides, in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157.

activities that are similar in kind to the concerted activities listed in § 7. *See Circuit City*, 532 U.S. at 114–15 (discussing same).

And the specific concerted activities in § 7 (self-organization; forming, joining, and assisting a union; and collective bargaining through elected union representatives) identify certain formal ways in which employees can organize in the workplace and address working conditions with their employer. When read together, then, these enumerated concerted activities describe the various stages of an industrial democracy in the workplace--"a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984). *See also* Morris, *NLRB Protection In The Nonunion Workplace*, 137 U. Pa. L. Rev. at 1684 (§ 7 was intended to achieve a "democracy in the workplace").

And so the residual phrase "other concerted activities" should be interpreted to protect various similar ways in which employees can join together in the workplace for a common cause, but without having to form a union or engage in collective bargaining. That is, "other concerted activities" protects the associational rights of all employees, not just unions. "A proper construction [of 'other concerted activities'] is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated." *NLRB v. Phoenix Mut. Life Ins. Co.*,

167 F.2d 983, 988 (7th Cir. 1948). *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (work stoppage by seven nonunion employees was "other concerted activity" under § 7: "The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could."); Morris, *Protection in the Nonunion Workplace*, 137 U. Pa. L. Rev. at 1687 (phrase "other concerted activities" protects "one or more employees attempting to interact or make common cause with one another regarding a matter relevant to their working conditions. The process may or may not come to the attention of the employer, and it may or may not reach the stage of formal union organizational activity.").

Group legal action, however, has nothing to do with the ways in which employees can join together in the workplace to address working conditions. "Had Congress intended the latter all encompassing meaning, . . . it is hard to see why it would have needed to include the examples at all." *Yates*, 135 S. Ct. at 1086 (citation and internal quotation marks omitted). To interpret "other concerted activities" as broadly as the employees and the NLRB assert would render superfluous Congress' careful enumeration of the concerted activities in § 7. And "[w]e typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless." *Id.* at 1087 (citation and internal quotation marks omitted).

E. Congress Chose The Phrase "Concerted Activities," Not "Concerted Action," Indicating An Intent To Protect The Right To Engage In Certain Conduct, Not The Right To Sue.

Notably, Congress chose the phrase "concerted *activities*" in § 7, which indicates conduct, not litigation. Congress did not use the phrase "concerted *action*," which could include litigation.

In particular, when Congress wants to protect or proscribe certain conduct, it generally uses the word "activity," as it has done here.[7] But when Congress wants to create a right to sue, it generally uses the word "action," whether by itself or in such phrases as "civil action" or "cause of action."[8] And in some instances, Congress has used both words--"activity" and "action"--in the same statutory section, precisely to distinguish between the conduct that is being regulated (the "activity") and the right to sue

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[7] *See, e.g.* 18 U.S.C. § 1962(a) ("Prohibited Activities") (RICO statute proscribes conduct related to "racketeering *activity*") (emphasis added); 8 U.S.C. § 1182(a)(3)(B) ("Terrorist *activities*") (prohibiting issuance of visas to anyone engaged in "terrorist *activities*") (emphasis added).

[8] *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) ("a civil *action* may be brought against the [employer]" for workplace discrimination) (emphasis added); 15 U.S.C. § 78u-6(h)(1)(B)(i) ("Cause of *action*") (Dodd-Frank whistleblower "may bring an *action*" for retaliatory employment decision) (emphasis added); 42 U.S.C. § 3613(a)(1)(A) ("Civil *Action*") ("An aggrieved person may commence a civil *action*" for discriminatory housing practices) (emphasis added).

over that regulated conduct (the "action").[9] In short, interpreting the word "activity" to embrace legal action is inconsistent with Congress' own use of that word. It is therefore a strained and unpersuasive reading of § 7.

This point is reinforced by the fact that the NLRA does not provide employees with a private right of action against their employer. Instead, Congress delegated exclusive enforcement powers to the NLRB to pursue claims of unfair labor practices. *See* 29 U.S.C. § 160(a) ("Powers of Board generally") ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . ."). It is doubtful, then, that Congress would have intended the term "other concerted activities" to include group legal action when Congress did not even deem it necessary to allow employees to sue individually, on their own behalf.

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[9] *See, e.g.*, 15 U.S.C. § 1125(a)(1)(A)-(B) ("Civil Action") (Lanham Act provides "civil *action*" for unfair competition through misleading advertising or labeling pertaining to "goods, services, or commercial *activities*") (emphasis added); 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any *case* . . . in which the *action* is based upon a *commercial activity* carried on in the United States . . . .") (emphasis added).

F. When Understood In Its Historical Context, The NLRA's Protection Of "Concerted Activities" Simply Meant That It Was No Longer Illegal For Employees To Act In Concert To Address Their Working Conditions.

The Court has instructed that the NLRA should be understood in its historical context, "[so that] we may, by such an examination, reconstitute the gamut of values current at the time when the words were uttered." *Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620 (1967) (quotation and internal quotation marks omitted).

Before the NLRA's passage, any concerted efforts by employees to address working conditions would have been illegal "merely because they [were] undertaken by many persons acting *in concert*." *Int'l Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 258 (1949) (emphasis added) (*overruled on other grounds by Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)).

The NLRA simply reversed the historical meaning of "concerted activities"--i.e., legally prohibited group conduct--to legally protected group conduct. This had nothing to do with creating a new right of group legal action and everything to do with permitting employees to engage in collective workplace efforts to address the terms and conditions of their employment.

In the years preceding the NLRA's passage,

employees had been prohibited from acting "in concert" to address working conditions, such as by organizing, striking, or picketing. "Th[e] history [of § 7] begins in the early days of the labor movement, when employers [successfully] invoked the common law doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize." *City Disposal Sys.*, 465 U.S. at 834. Any such efforts to address working conditions, "although lawful if pursued by a single employee, became unlawful when pursued through the *'conspiracy' of concerted activity.*" *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 716 (1982) (discussing legislative history of Norris-LaGuardia Act of 1932, a predecessor labor statute to NLRA) (emphasis added).

In the labor-related statutes that came before the NLRA, Congress began to remove the legal barriers that had prevented workers from joining together, in and around the workplace, to address their working conditions. To do this, Congress used the phrases "in concert" and "concerted activities"--buzzwords of that era that had been associated with workers' illegal efforts to combine or conspire in the workplace--in order to begin reversing the pejorative meaning of those words.[10]

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[10] "[Congress'] first use of the term "concert" in th[e labor] context, came in 1914 with . . . the Clayton Act, which exempted from the antitrust laws certain types of peaceful union activities." *City Disposal Sys.*, 465 U.S. at 834. *See also* 29 U.S.C. § 52 (Clayton Act prohibits federal courts from enjoining "any person or persons, whether singly or in *concert*, from [organizing, boycotting, striking] . . . or from peaceably assembling in a lawful manner, and for lawful purposes[.]")

With the NLRA's enactment in 1935, Congress made a clean break from the past by declaring that employees were no longer legally prohibited from engaging in concerted activities in the workplace. To the contrary, they now had the protected legal right to do so. As the Court explained, not many years after the NLRA's passage:

> The most effective legal weapon against the struggling labor union was the doctrine that *concerted activities were conspiracies*, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer . . . . No longer can any state . . . treat otherwise lawful activities to aid unionization as an *illegal conspiracy merely because they are undertaken by many persons*

(emphasis added).

In 1932, in § 4 of the Norris-LaGuardia Act, Congress again prohibited federal courts from enjoining employees, "whether [acting] singly or *in concert*," from engaging in various listed activities, such as participating in a labor organization or a strike, which occur during a labor dispute. 29 U.S.C. § 104 (emphasis added). The Norris-LaGuardia Act also stated the broad public policy that "the individual unorganized worker . . . shall be free from the interference, restraint, or coercion, of employers . . . in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" 29 U.S.C. § 102 (emphasis added). *See also City Disposal Sys.*, 465 U.S. at 834-35 (discussing same). This language, in turn, "was the source of the language enacted in § 7 [of the NLRA]." *Id.* at 835.

acting in concert.

Int'l Union, U. A. W., A. F. of L., Local 232, 336 U.S. at 257–58 (emphasis added).

When viewed in its historical context, then, "concerted activities" means only that "lawful individual action should not become unlawful when engaged in collectively." Gorman and Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. at 336. In sum, the NLRA's deliberate reversal of the negative historical meaning of "concerted activities" had nothing to do with creating a new right of employees to join together and sue their employer.[11] Instead, the NLRA merely removed the legal barriers that had prevented employees from joining together in the workplace.

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[11] In this connection, there was no such thing as a class suit for damages when the NLRA was enacted in 1935. "It was not until the promulgation of original Rule 23 and the first Federal Rules of Civil Procedure in 1938 that law and equity were merged, and [opt-in] class suits for damages in the United States first became available . . . ." William B. Rubenstein, 1 *Newberg on Class Actions* § 1.13, at 36 (5th ed. 2011). Similarly, the FLSA's opt-in collective action provision was not enacted until 1938. *See* Pub. L. No. 75–718, § 16(b), 52 Stat. 1069 (1938) (codified at 29 U.S.C. § 216(b)). And, of course, the "modern [opt-out] class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999).

II. NOTHING IN *EASTEX V. NLRB* SUGGESTS THAT THE NLRA OVERRIDES THE FAA'S MANDATE TO ENFORCE CLASS AND COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS.

Nothing in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), suggests that the NLRA creates a substantive right of group legal action that displaces the FAA's mandate to enforce class and collective action waivers in employment arbitration agreements. *Eastex* did not involve the FAA, did not concern the NLRA's "other concerted activities" language, and it did not involve any judicial action taken by employees. Instead, that case decided the unrelated issue whether the *purpose* of certain concerted workplace activity constituted "other mutual aid or protection" under § 7. *See* 129 U.S.C. § 157 ("Employees shall have the right . . . to engage in other concerted activities for the *purpose* of collective bargaining or *other mutual aid or protection* . . . .") (emphasis added).

In *Eastex*, employees wanted to distribute a union newsletter in the workplace that, among other things, encouraged employees to write to their state legislators to oppose incorporation of Texas' "right-to-work" statute into the state constitution; criticized a Presidential veto of an increase in the federal minimum wage; and urged employees to register to vote to "defeat our enemies and elect our friends." *Eastex*, 437 U.S. at 558-60. The employer refused to allow the employees to distribute the newsletter, asserting that the newsletter was not for their "mutual aid or protection" because it discussed ways

in which employees could "improve their lot as employees through [political] channels [that were] outside the immediate employee-employer relationship." *Id.* at 565.

The Court rejected the employer's position and affirmed the NLRB's decision that the proposed concerted activity--distribution of the union newsletter in the workplace--was for the protected purpose of "mutual aid or protection" under § 7. *Id.* at 564-70. The Court based its decision largely on the NLRA's broad definition of "employee," which "shall include *any* employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." 29 U.S.C. § 152(3) (emphasis added). The Court explained that this definition "was intended to protect employees when they engage in otherwise *proper concerted activities* in support of employees of employers other than their own." *Eastex*, 437 U.S. at 564 (emphasis added).

Consistent with this broad statutory definition of "employee," the Court held that the NLRA protected the employees' concerted activity of distributing the newsletter in the workplace, even though the newsletter advocated political activity taken outside the workplace. *Id.* at 564-67. The Court explained that the purpose of that outside activity was for Eastex employees to act in solidarity with the rights of fellow employees located throughout the state of Texas (the "right to work" statute) and the nation (the federal minimum wage). *Id.*

To be sure, the Court in *Eastex* stated, in passing, that "it has been held [by the NLRB] that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums . . . ." *Eastex*, 437 U.S. at 565-66. *See also id.* at 566 n.15 (citing NLRB decisions involving judicial or administrative action taken by employees).[12] But this statement is merely *dictum* to the Court's holding that the "mutual aid or protection" clause can include purposes that are outside the employer's control, such as the political activity discussed in the disputed union newsletter. Moreover, the Court expressly declined to consider whether the cited NLRB decisions involving judicial or administrative action would satisfy the "other concerted activities" requirement. "We do not address here the question of what may constitute 'concerted' activities in this context." *Id.* at 566 n.15

In short, *Eastex* does not suggest in any way that the NLRA displaces the FAA's mandate to enforce class and collective waivers in employment arbitration agreements. Nor does the NLRA contain a contrary congressional command that overrides the FAA's mandate, for all of the reasons that NELF has discussed above. Therefore, the employees' arbitration agreements in these consolidated cases should be enforced according to their terms.

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[12] Notably, none of the NLRB decisions that the Court cited for this proposition involved a class or collective action. *See Eastex*, 437 U.S. at 566 n.15.

CONCLUSION

For the reasons stated above, NELF respectfully requests that the judgment in the Fifth Circuit in *Murphy Oil* should be affirmed, and that the judgments in the Seventh Circuit in *Epic*, and in the Ninth Circuit in *Ernst & Young*, should be reversed.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, Massachusetts 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

June 16, 2017

RECORD AND BRIEFS

FILED
AUG 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, Petitioner,
v.
JACOB LEWIS, Respondent.

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
MURPHY OIL USA, INC., ET AL., Respondents.

ERNST & YOUNG LLP, ET AL., Petitioners,
v.
STEPHEN MORRIS, ET AL., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF NEW YORK TAXI WORKERS ALLIANCE AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

JEANNE MIRER
COUNSEL FOR AMICUS CURIAE
MIRER, MAZZOCCHI, JULIEN & CHICKEDANTZ
150 BROADWAY, SUITE 1200
NEW YORK, NY 10038
(212) 231 2235
JMIRER@MMSJLAW.COM

AUGUST 16, 2017

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

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RULE 29: STATEMENT OF INTEREST OF AMICUS CURIAE NEW YORK TAXI WORKERS ALLIANCE

The New York Taxi Workers Alliance (NYTWA)[1] submits this Amicus Curiae brief to vindicate the public interest in promoting compliance with labor law which protects the rights of workers to engage in activities for their mutual aid and protection. NYTWA also seeks to ensure that the decision reached by this Court is in conformity with a body of existing international human rights law which is binding on this country.

The NYTWA was founded in 1998 with the express purpose of seeking to improve the lives of those working in the taxi and for hire vehicle industry. NYTWA has been involved in countless efforts to expand the legal protections for drivers. NYTWA has acted on behalf of its almost 20,000 members in many fora including Court cases and at the Taxi Limousine Commission (TLC) of the City of New York.

The NYTWA will elucidate the problems occasioned by the use of arbitration agreements with class waivers, by citing to a specific example of the abuse of these agreements/waivers by a large corpora-

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[1] No counsel for any party authored this brief in whole or in part. No party, or its counsel, or any entity other than the undersigned amicus and their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of amicus briefs. *See* Rules 37.6, 37.3(a).

tion known as Uber. The example of how Uber has used its arbitration agreement and the class action waiver to frustrate the rights of Uber drivers provides to this Court a perfect example of a corporation which is using these agreements to insulate itself from accountability for misclassifying its hundreds of thousands of drivers as independent contractors. The information below will describe Uber's activities primarily in New York City.

Ever since Uber made its entrance into the New York City market in 2012, there has been a growing demand from persons who now drive for Uber for the services of the NYTWA. From the time Uber entered the New York market and has now developed a major market share, Uber has slashed the fares paid to drivers while increasing the fee paid to Uber, resulting in drivers having to drive many more hours per week than they did at the beginning in order to earn a modest living. At the same time the wages of workers in this market including taxi and other limousine drivers have plummeted in a virtual race to the bottom. Most of the drivers who contact NYTWA want to organize so as to have a voice in setting their pay and working conditions with Uber. However, they have been classified by Uber as independent contractors and therefore do not have rights under the National Labor Relations Act to organize a union.

Uber has both misclassified drivers as independent contractors and requires drivers upon activating its application ("app") to agree to individually arbitrate any claims against Uber. They cannot activate the app unless they click that they have agreed to the terms of the agreement which contains a twenty page

small print contract and which describes Uber drivers as independent contractors as well as a requirement that all disputes between the driver and Uber must be individually arbitrated.

In December 2015, in response to litigation instituted against Uber in California, Uber revised its arbitration agreement and gave drivers the right to "opt-out" of the arbitration obligation within 30 days. The overwhelming number of drivers, however, are not able to read or understand the contract on their phones and despite NYTWA's efforts to advise drivers to opt out, most do not realize the import of what they have signed until it is too late to opt out.

The NYTWA has supported the drivers in filing litigation in 2016, and has filed Unfair Labor Practice (ULP) charges at the NLRB on behalf of these workers. It is evident to NYTWA that Uber has intentionally misclassified its drivers as independent contractors and has intentionally limited the drivers' remedy to individual arbitrations so as to insulate itself from liability for its intentional misclassification. In light of the foregoing, your amicus has a direct interest in the outcome of these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of this brief is to bring the Court's attention to a major way that corporations such as Uber intend to hide behind Arbitration agreements to ensure that there is no effective way for drivers who

are employees to address the issue of misclassification and to obtain the benefits of labor laws they are currently excluded from by virtue of their misclassification.

Your Amicus also wants to bring to the Court's attention United States treaty obligations as well as customary international law which bear on the legality of these class action waiver clauses and the ability of the court to deprive workers an effective judicial remedy.

Your Amicus has read the briefs submitted by the NLRB, and some of the amici in support of the parties opposing the use of these class action waivers and agrees with the positions espoused therein. This brief does not repeat these arguments.

I. STATUS OF UBER AND OTHER TAXI OR FOR HIRE VEHICLE DRIVERS IN NEW YORK CITY

NYTWA has done an in-depth analysis of whether Uber has intentionally misclassified its drivers. Although the information below is based on drivers in New York City, Uber takes the position throughout the country that its policies are uniform. In New York City, Uber drivers are treated the same way as traditional "Black Car" drivers who have consistently been found to be employees not independent contractors. As noted above, your Amicus filed a ULP on driver misclassification with the NLRB. NYTWA sets forth below facts and arguments in support of their claim that Uber drivers are employees which were originally submitted in support of that ULP. For purposes of brevity exhibits which confirm the

statements will not be included but have been provided to the NLRB.

Drivers in New York City's taxi and for-hire vehicle industry are divided into two main categories: Taxi drivers and for-hire vehicle ("FHV") drivers. Uber's employees all drive vehicles that are affiliated either with one of Uber's twenty-six for-hire vehicle bases, or with another TLC-licensed Black Car base.

New York City taxicab drivers, who either own or lease their vehicles and medallions, can only pick up passengers who hail them for immediate service. While taxi drivers may drive a taxi leased from a fleet, the driver pays for fuel and keeps all fare revenue and tips earned during a shift. Taxi drivers pay the vehicle and medallion owner or a broker a set amount to lease the vehicle, and work is typically divided between a day shift and a night shift, with workers driving up to 12-hour shifts, either from roughly 5 am to 5 pm, or 5 pm to 5 am.

In New York City, Uber operates through the For-Hire Vehicle framework, operating several FHV bases. FHV drivers typically obtain their own car and affiliate that car with a unique FHV base. Unlike taxi drivers, FHV drivers may not pick up passengers who hail them on the street; rather, they are directed to pick up passengers through dispatches from their base. Uber drivers work on a commission system. Uber passengers pay a full fare amount to Uber, which Uber remits as pay to the driver after collecting a fee of 20-28%, depending on the type of service and vehicle used for the trip, and when the driver first signed up to work for Uber.

Aside from its scale and market share, Uber's operations are substantially similar to those of many other New York City black car companies. This is significant because the National Labor Relations Board, U.S. Department of Labor, and the New York State Department of Labor have found New York City black car drivers working in similar circumstances to be employees, not independent contractors.

A. State and Federal Agencies Have Consistently Found Black Car Drivers to Be Employees, Not Independent Contractors

Recently courts and agencies have taken up the question of whether black car drivers and Uber drivers in particular, are employees under state and federal labor and employment laws. Although these cases have involved various statutes and regulations, the courts and agencies considering them have all sought to determine the drivers' employee status by using some variation of the factors found in the common law test employed by the NLRB.

An Administrative Law Judge in the New York Department of Labor, recently ruled that several Uber drivers who filed for unemployment compensation were employees within the meaning of the New York Labor Law. *See*, A.L.J. Case No. 016-19369.

Similarly the California Labor Commission held that a former Uber driver was an employee under California wage and hour laws and was entitled to reimbursement of work expenses, including fuel costs. *Berwick v. Uber Technologies Inc.*, 2015 Cal. Wrk. Comp LEXIS 118 (W.C.A.B. June 3, 2015). The Labor Commission reached this decision after following

California Supreme Court precedent regarding employee status, which follows a test "principally derived" from R.2d Agency § 220. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). The Labor Commission specifically noted that Uber had "all necessary control over the operation as a whole," as it procured clients through its app, assigned jobs to drivers, and that Uber's business simply would not exist without the work performed by its drivers. Although most Uber drivers in California do not drive licensed taxi or livery vehicles, the manner in which they receive dispatches and payment for trips is substantially identical to TLC-licensed Uber drivers' work in New York City.

In the Unemployment Insurance context, the New York State Department of Labor and the Appellate Division of the New York Supreme Court, have found black car bases with similar terms of employment as Uber to be employers on several occasions. Although the Department has, at times, found that drivers are independent contractors where they held a franchise or ownership interest in the black car or limousine company, the Department has generally found an employment relationship between drivers and dispatching bases. In *Matter of Khan v. Commissioner of Labor*, 66 A.D.3d 1098 (3d Dep't 2009), lv denied 13 NY3d 717 (2010) the Appellate Division affirmed the Department's finding that a black car base was an employer where it paid its drivers a set commission per fare, dispatched trips to drivers specifying pick-up and drop-off locations, set all fare rates, and handled all billing. In *Matter of Automotive Services v. Commissioner of Labor*, 56 A.D.3d 854 (3d Dep't 2008), a black car base was found to exercise sufficient

control over drivers' work where it paid drivers a percentage commission, provided dispatch information, told drivers to hold signs with the company's name, specified acceptable cars for use with the company, handled the customer complaint process and dictated how long in advance a driver should arrive at a pick-up spot. In *In re B.S.M. Limousines Corp.*, a limousine company was found to be an employer even where its drivers were free to refuse work, and were allowed to compete for business with the employer. 143 A.D.2d 459 (3d Dep't 1988), lv denied 73 N.Y.2d 703 (1988). Numerous other cases have resulted in similar conclusions. *See also, Matter of Spectacular Limo Link, Inc. (Commissioner of Labor)*, 21 A.D.3d 1172 (2005); *Matter of Eliraky (Crosslands Transportation, Inc. (Commissioner of Labor)*, 21 A.D.3d 1197 (2005); *In re Claims of De Paiva*, 270 A.D.2d 534 (2000).

B. The NLRB Board Has Consistently Found New York City Black Car Drivers to Be Employees, Not Independent Contractors

The National Labor Relations Board has consistently asserted its jurisdiction over black car companies in New York City. Although New York City taxi fleets used to be classified as employers when they paid drivers on a commission basis and assigned drivers jobs via radio dispatch, when the taxi industry switched to a leasing-based business model, the Board held that fleet taxi drivers were no longer employees under the NLRA. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300 (2004). Since the Taxi and Limousine Commission first created distinct taxi and FHV sectors, the Board has held that many black car and limo drivers are employees under the NLRA. *See, e.g., Elite*

Limousine Plus, Inc., 324 NLRB 992 (1997). After the taxi sector had switched to leasing, the black car sector retained a dispatch-and-commission system which the Board had long found significant in creating an employment relationship between taxi companies and drivers in New York and in cities that have maintained that structure. *See, e.g.*, *Stamford Taxi*, 332 NLRB 1372, 1373 (2000). The relationship that Uber has structured with its employees, begins by re-creating the commission-and-dispatch system that was used when taxi fleets were found to be employers and that is still used by black car bases.

In *NYC 2 Way Int'l Ltd.*, an NLRB Regional Director found that drivers working for a black car base were employees and not independent contractors, after assessing the Restatement factors, as applied by the Board, and relying on prior Board decisions involving taxicab and limousine companies with similar terms and conditions of employment. 2000 NLRB Reg. Dir. Dec. LEXIS 318 (29-RC-9411, July 31, 2000).

C. The *Brock* Factors:

In *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) the court set forth various factors for determining employee status.[2] These factors

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[2] Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the FLSA. These factors, derived from *United States v. Silk*, 331 U.S. 704, 91 L.Ed. 1757, 67 S.Ct. 1463 (1947) (Social Security Act), and known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or

for determining employee status have been repeatedly cited. Your amicus sets forth below some evidence of the high degree of control Uber exercises over its drivers as well as other information which militates in the direction of Uber drivers being found to be employees.

1. There Is Significant Evidence That Uber Drivers Are Employees of Uber Not Independent Contractors

Uber maintains constant and active control over how its drivers perform their work. While independent contractor New York City taxi drivers find all of their passengers on their own, Uber assigns jobs to drivers who are in the vicinity of potential passengers who have requested a trip from Uber. When a driver receives a trip request, he/she must respond to it quickly. Although not explicitly "directed" to accept all trips, if a driver remains logged in and does not accept 90% of trip requests, the Uber contract implies that it may take negative action against his/her account, and he/she will not qualify for minimum pay guarantees. Uber tells drivers that "you should accept a least 80% of trip requests to retain your account status." Drivers who do not accept 90% of trips will lose their ability to maintain "VIP" status. Drivers who do not accept two trip requests in a row, will be locked out of the Uber app for ten minutes. Uber also determines what type of car a driver must have to drive in the different categories of Uber's service. Uber routinely

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duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

directs drivers to various dealerships with which it does business to finance cars.

2. Uber Also Directs the Driver's Work

Uber directs its employees to work in specific areas, by tying their compensation their presence in specific zones, namely areas in Manhattan and nearby Brooklyn neighborhoods. Despite assurances in the contract that Uber does not get involved in the provision of transportation services by its drivers, Uber exercises significant direct and indirect control over the routes taken by its drivers. While the contract requires drivers to accept responsibility for the effectiveness and efficiency of Uber rides, Uber will unilaterally decide what route a driver should take or, after the fact, should have taken. Uber will reduce a driver's pay accordingly, without first consulting the driver, or even examining the surrounding traffic conditions.

3. Customer Service & Employee Discipline

As time went by and Uber began being sued for misclassification, directions to drivers were referred to as "tips" and "suggestions." Regardless of how such suggestions may be framed for drivers, they create a legitimate expectation of worker behavior among Uber's customer base. When these expectations are not met, drivers will receive negative reviews from passengers, which are often the sole basis for employee discipline, including suspension or termination imposed *by Uber*. Uber tells its passengers that "After every trip, you rate the driver and provide feedback about your ride . . . We use your feedback to help drivers improve the Uber experience they deliver." Uber's driver handbook tells drivers that "You're likely to be deactivated" if

their ratings fall below 4.5 stars. When a passenger makes a complaint about a specific driver, this information is submitted to Uber through the app or in an e-mail; the driver does not *see* the complaint and drivers do not know which customers have given them which ratings. Customers may not communicate their feedback directly to drivers. At the end of a payment period, Uber e-mails each driver a summary of their week's performance, telling them their average rating for the week, the number of five-star ratings received, and suggestions for improvement. Uber notifies drivers when they received negative feedback.

Uber also controls the type of work and access to jobs that drivers receive through a system of rewards based on passenger ratings. Drivers who, after a certain amount of time driving for Uber receive high ratings effectively receive promotions, as they become eligible for more categories of trips. Based on passenger-provided positive rankings, Uber rewards drivers by upgrading their status to allow drivers more opportunities to pick up passengers and to pick up more lucrative classes of passengers; these opportunities are not available to drivers with lower ratings.

Drivers who achieve higher ratings are automatically classified as "UberVIP" drivers. Drivers who achieve this status will be eligible for trips with Uber Passengers who select UberVIP service, knowing that they will be driven by a top-rated Uber driver. The passenger rating system rewards drivers who follow Uber's customer service expectations by providing them with more fares than non-VIP drivers would receive. On the other hand, drivers who receive low ratings will be deactivated from the app temporarily

or permanently. Deactivated drivers must take an Uber-mandated re-training course before Uber will reactivate their accounts and continue to dispatch jobs to them.

4. Fare Payments

As with customer complaints, payments may not be made directly to the drivers, but are processed through the Uber app, with Uber taking its commission before remitting the remainder to the driver.

Uber drivers are not their own "bosses". Uber, is in the business of providing transportation services in which the driver works. Despite Uber's attempts to assert that it is in the technology business, and not the transportation business, it is clear that Uber operates in New York as a car service company. In terms of entrepreneurial opportunity this factor examines not only whether workers are free to pursue other business opportunities, but also whether a driver's gain or loss may vary depending to his or her entrepreneurial efforts. Given the reliance on Uber generated rides through the app the worker is dependent on Uber for his/her rides and thus whatever entrepreneurial efforts they may want to use, do not affect their gain or loss.[3]

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[3] It is true that Uber drivers do not have a fixed amount of hours they have to work. nonetheless given the fact that Uber has slashed the base fares it pays to drivers, since it became almost a monopoly in the New York City area, most drivers have to work longer hours just to make up for the lost income they used to get when the fares were higher.

II. Litigation Against Uber Will Not Be Dispositive on the Issue of Misclassification Because of the Class Action Waiver in the Arbitration Agreement

As noted above, drivers have no choice but to accept the contract in order to activate the Uber App. The Contract comes up when a driver first logs on. Drivers complain that they cannot read the contract on their phones before accepting it. The contract is very sophisticated and requires a high degree of English proficiency. While the Court in the California case required Uber to change the arbitration agreement in December 2015, and to use larger type to inform the driver of the arbitration clause, it does not tell the driver a time limit by which to opt-out of the agreement. Your amicus has been informed by Uber that only 18,000 drivers nationally have opted out of the agreement while several hundred thousand Uber drivers have not.

As noted above there is a strong possibility that at trial Uber drivers will be found to be employees by the Court in our litigation. However the effect of that litigation will be limited. Based on Uber's arbitration clause even if the plaintiffs in the New York Uber litigation are found to be employees the only persons who will benefit from this ruling are those persons who opted out of Uber's arbitration provision and opted into the FLSA case.

Uber has informed NYTWA through its filings at the NLRB that there are over 58,000 Uber drivers in New York City alone. Assuming the New York plaintiffs are successful in their litigation it is logical that all of the drivers will want to challenge their status as

independent contractors so as to gain the benefits of employee status.

A. How Much Time Will It Take to Arbitrate All of the Drivers Individual Claims?

Assuming all 58,000 drivers just in New York City seek to arbitrate their disputes individually, and assuming enough arbitrators could be found to do one arbitration a day every business day until all 58,000 are arbitrated, it would take approximately two hundred and twenty three years to arbitrate every claim! Even if one quarter of the drivers wanted to arbitrate their cases, using the same rate, it would take over 55 years to determine employee status! In the meantime, none of these workers have the right to seek to have an organized independent voice in their workplace.

B. Other Anomalous Results of the Court Upholding These Class Action Waivers

What would happen if during this process of arbitration, half the arbitrators found the drivers to be independent contractors and half found them to be employees? Could this happen if they all worked for the same employer under the same set of policies? This could happen if different arbitrators and lawyers did not prepare their cases or applied the factors different ways that your amicus would call pro-employer. Could this mean that half of the drivers could form a union, but the other half whose arbitrators ruled against them will have no protection under Section 7 of the National Labor Relations Act and not be allowed to unionize? Such an anomalous result exposes the real purpose behind employers seeking

protection of the Federal Arbitration Act. It is not a way to cheaply and efficiently resolve disputes, it is a way to protect themselves from any accountability for flaunting their obligations under the law to properly classify their workers as employees.

Rather than being an act to facilitate resolution of disputes, the FAA and the class action waiver becomes a sword against employees who want to exercise their rights to organize for mutual aid and protection.

As stated at the outset, your Amicus does not believe it is even a close question as to whether Uber drivers are employees. The effect of upholding the arbitration provision and the class action waiver however would insulate Uber from the effects of its wrongdoing in misclassifying these workers in the first instance for a long time. By doing so, this Court would unwittingly be complicit with this wrongdoing by implicitly allowing other employers to do what Uber has done and take their chances with misclassifying workers so as to deprive them of their rights for as long as possible ensuring they have no effective remedies under laws passed to protect them.

III. Compliance with United States Obligations Under Our Treaties Requires an Interpretation of United States Law Consistent with Providing an Effective Remedy to Workers Like Those Represented and Supported by Your Amicus

International law is part of United States law and must be faithfully executed by the President and enforced by U.S. courts when consistent with the U.S.

Constitution and legislation adopted by Congress. The United States is a party to, and therefore bound by, several international human rights treaties whose provisions would require this Court to interpret our laws consistently with these international agreements.

A. International Treaties and Customary International Law Are Relevant to the Interpretation of the Statutes Applicable in This Case

Under the Supremacy Clause of the Constitution, "treaties made . . . under the authority of the United States, shall be the supreme law of the land."[4] Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court long ago invented a rule requiring implementing legislation before U.S. courts can enforce treaties that are deemed "non-self-executing."[5] All major human rights treaties to which the United States is a party have been interpreted by the Senate or the courts as non-self-executing.[6] Therefore, the treaty provisions themselves are not directly enforceable in U.S. courts except to the extent they are already reflected in the Constitution or existing legislation, or unless Congress has adopted implementing legislation.

Although the international human rights treaties referred to here are not directly enforceable in U.S.

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[4] U.S. Const. Art. VI, cl. 2.

[5] *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

[6] *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights); Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990), at II(2) (Convention Against Torture).

courts *qua* treaties, they nonetheless contain rules binding on U.S. courts. In those cases in which Congress has not enacted implementing legislation, the U.S. government has uniformly taken the position that the U.S. Constitution and legislation already put the United States in compliance with the human rights treaties to which it is a party.[7] Consequently, the legislation applicable in this case and discussed below should be interpreted in a manner consistent with U.S. obligations under human rights treaties that it has ratified. This conclusion comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Schooner Charming Betsy*: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[8] "The law of nations" was the term used at the time to refer not only to international treaties to which the United States is a party, but to customary international law (which was the rule at issue in *The Charming Betsy*). That doctrine has been consistently and recently reaffirmed by the Supreme Court,[9] and in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit reaffirmed that the fact that a treaty is not self-executing does

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[7] *See, e.g.*, U.N. Doc. CAT/C/28/Add.5, ¶¶ 58-60 ("Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.").

[8] 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

[9] *See, e.g., F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 542 U.S. 155, 164 (2004).

not imply that the rule it establishes does not control the outcome of a case, if the rule is embodied in customary international law.[10]

Customary international law is directly enforceable in U.S. courts without implementing legislation.[11] In *The Paquete Habana*, the Supreme Court held that customary international law "is part of our law" and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls. [12] As will be discussed, each of the human rights treaty rules applicable in this case have also become customary international law.[13]

B. Applicable Treaties and Customary International Law

The United States has been bound by the International Covenant on Civil and Political Rights ("ICCPR") since U.S. ratification of the treaty in 1992.[14] Article 2 of the CCPR states in relevant part:

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[10] 630 F.2d 876, 881-85 (2d Cir. 1980).

[11] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

[12] 175 U.S. 677, 700 (1900).

[13] These human rights treaties did not appear out of nowhere. Millions of people died in two world wars before there was an agreement to form the United Nations and with it the Universal Declaration of Human Rights (UDHR). The UDHR from which the ICCPR was developed proclaimed a bright connection between peace and realization of human rights.

[14] 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[. . .]

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.[15]

Article 22 of the ICCPR states:

1. Everyone shall have the right to freedom of association with others, including the right to

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[15] International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter "CCPR"] (emphasis added).

form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

C. The Right to Freedom of Association and to Form and Join Trade Unions to Protect Ones Interests is Customary International Law

The United States has not ratified ILO convention 87 on Freedom of Association. The main reason the United States gives for non-ratification is that our laws already provide protection for workers to exercise their rights to freedom of association including the right to form and join trade unions to protect their

interests. The National Labor Relations Act protects these rights as part of a workers right to work together for mutual aid and protection. But freedom of association and to form unions has been recognized as customary international law. *See Estate of Rodriguez v. Drummond*, 256 F.Supp.2d 1250 (N.D. Ala. 2003). Furthermore in 1998, the International Labor Conference (ILC) of the ILO adopted the Declaration of Fundamental Principles and Rights at Work (FPRW). This Declaration identifies four "core" categories of rights set out in eight conventions which are considered fundamental. These include the rights to freedom of association and collective bargaining in Conventions Nos. 87 and 98. The Declaration is based on the acceptance by all ILO member states of the content of the ILO Constitution arising out of membership in the Organization. It records that

> "all Member States, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership of the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions . . . ."

Declarations of the ILC, the highest body of the ILO, stand out because they are issued so infrequently and "always with the aim of expressing or reiterating the Organization's fundamental principles. Conference declarations are, therefore, of a very solemn nature. Thus, even though Declarations are not open for ratification, they may be perceived as an expression

of customary international law or of *jus cogens*, *i.e.* peremptory norms of international law."

As customary international law or *jus cogens*, the rights to freedom of association and collective bargaining are binding on all States (and therefore indirectly on all employers in those states) regardless of ratification of the Conventions and those rights are directly enforceable in our Courts.

D. For This Court to Uphold Class Action Waivers of Arbitration Agreements Especially as They Are Used in the Misclassification Context Is Contrary to Our Obligations Under These Treaties and the Court's Obligations to Interpret Our Law Consistent with Our International Obligations or to Apply Customary International Law

As noted above Article 22 of the ICCPR does not allow restrictions to be placed on the right of freedom of association and the right to form trade unions, unless such restrictions are which are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. Subsection 3 of Article 22 does not permit a court to apply the law in such a manner as to prejudice, the guarantees provided for in Convention 87. The class action waivers in arbitration clauses, such as in the Uber contract, because they act as restrictions on the right of freedom of association as they prevent these workers who are misclassified from effectively challenging their status, thereby not allowing them to band together for mutual aid and protection or to

form and join trade unions, violate their rights as stated in Article 22 of the ICCPR.

Class action waivers do not meet the necessity test of Article 22's bases for restrictions. Trade unions promote democracy, and play an important role in a democratic society. There is no national security reason to restrict the rights of the workers represented by your amicus to have access to the Courts to test their independent contractor status or enforce their rights collectively under existing labor law. Restrictions on the right of freedom of association represented by these class action waivers are not necessary for the protection of public health or morals or do they prejudice the rights and freedoms of others, other than perhaps to prejudice the desires of employers like Uber to exploit their workforce and deprive them of any meaningful remedy, but that is not the type of freedom or right the ICCPR contemplated. Thus, by not being an allowable restriction, the class action waivers violate the rights of workers such as those represented by your amicus to freedom of association and would represent an interpretation which would prejudice their rights under the ILO Convention 87.

Therefore, if this Court were to interpret the NLRA in such a manner as to uphold these class action waivers in arbitration clauses, the interpretation would not only violate the rights of workers under the NLRA, it would be an interpretation of an act of Congress that violated our obligations under a ratified treaty, customary law and the rights of workers to have an effective judicial remedy. It would be an interpretation which would violate the principles of statutory construction enunciated by this Court at

the very beginning of its existence in the *Charming Betsy* case.

CONCLUSION

As the example of Uber shows, there is a perverted interpretation of the FAA that is being urged on this Court by employers whose cases are being considered. This perversion seeks not to use arbitration as a way to efficiently resolve disputes, but as a way to prevent workers from exercising the substantive rights they fought to obtain. It is apparent employers want to use these modern day "yellow dog" contracts to stifle worker organization for mutual aid and protection and in the process give themselves immunity for their own violations of law. This is not the kind of result this Court should condone. Your amicus, therefore, urges this Court to reverse the decision of the Fifth Circuit and affirm the decisions of the Seventh and Ninth Circuits.

Respectfully submitted,

JEANNE MIRER
COUNSEL FOR AMICUS CURIAE
MIRER, MAZZOCCHI,
JULIEN & CHICKEDANTZ
150 BROADWAY, SUITE 1200
NEW YORK, NY 10038
(212) 231 2235
JMIRER@MMSJLAW.COM

AUGUST 16, 2017

RECORD AND BRIEFS

No. 16-285

In the
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,

Petitioner,

v.

JACOB LEWIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Epic Systems, Inc., petitioner Ernst & Young LLP, and respondent Murphy Oil USA.[1] Founded over 40 years ago, PLF litigates matters affecting the public interest at all levels of state and federal court, representing the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving contractual arbitration and class actions in both the consumer and employment context. *See, e.g.*, *ABM Indus., Inc. v. Castro*, 137 S. Ct. 82 (2016); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *D.R. Horton, Inc. v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013); and *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases ask this Court to determine whether the "concerted activities" provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 157 (also known as "Section 7"), prohibits employers and employees from agreeing to individual arbitral resolution of workplace disputes; an agreement generally protected by the Federal Arbitration Act (FAA).

While federal law places some substantive limits on the ability of adults to freely contract to arrange their affairs, courts generally respect people's rights to determine the procedures by which they will resolve their disputes. *See H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) ("One of the fundamental policies" underlying the NLRA is "freedom of contract."). This policy controls here as well. Section 7 does not create a substantive, non-waivable right to pursue claims unrelated to the NLRA on a class basis. Aggregation of claims is a procedural choice, not a substantive right. Under the FAA, employees and employers are free to contract for dispute resolution in any manner that they so desire, including individualized resolution without an option for aggregated claims in a class action or class arbitration procedure. *AT&T Mobility*, 563 U.S. at 339. Because aggregation does not alter the substance of an underlying claim, and because arbitral resolution similarly does not alter the substance of an underlying claim (even claims based on federal statutes), employment contracts that require individual arbitration must be upheld.

Moreover, there is nothing inherently wrong or unfair with an employer requiring arbitration of work-

related disputes. This outlook, which reflects congressional policy favoring arbitration, is codified in the FAA. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Some job seekers may appreciate the benefits of arbitration; others may want to retain the right to go to court. Job seekers who place a high value on the ability to go to court should seek employment with an employer who does not require arbitration. Similarly, a job seeker who places a high value on the expressive nature of his sartorial style should not apply for a job that requires a uniform.

Finally, these cases arise because of the NLRB's longstanding "policy of nonacquiescence," a troubling anti-constitutional doctrine in which executive agencies refuse to comply with federal court decisions. While this Court need not rule on the constitutionality of the policy itself, it shapes the context in which these consolidated cases arise.

For all these reasons, the decision below should be reversed.

ARGUMENT

I

ARBITRATION OF WORKPLACE DISPUTES REFLECTS CONTRACTUAL FREEDOM PROTECTED BY THE FAA

A. Aggregate Litigation Is a Matter of Procedure, Not a Substantive Right

The FAA provides that arbitration agreements are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act also "mandates that district courts '*shall*' direct the parties to proceed

to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4). Accordingly, "agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement." *Id.* The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Id.* at 219-20. In this case, the NLRB's hostility to individual arbitration recently found refuge in two circuit courts.

Current law considers collective litigation, however styled, to be a matter of procedure, not a substantive right. This Court held in *American Express Co. v. Italian Colors Restaurant* that the antitrust laws and Federal Rule of Civil Procedure 23 do not counteract the procedural choices made by parties in arbitration contracts. 133 S. Ct. 2304, 2310 (2013). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) ("Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right.").

In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), this Court held that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *See also Circuit City Stores, Inc. v.*

Adams, 532 U.S. 105, 123 (2001) ("The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."); *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In short, plaintiffs do not forego any federal substantive rights by arbitrating their disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The agreement to arbitrate simply substitutes one forum for another; plaintiffs "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.*

The Board's position, that an employee's agreement to pursue employment disputes on an individual basis violates a core purpose of the NLRA, cannot be reconciled with the Board's acceptance of arbitration encompassed within collective bargaining agreements. *See, e.g.*, *Olin Corp.*, 268 N.L.R.B. 573, 577 (1984); *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955) (After collectively bargained-for arbitration, Board defers to arbitrators' awards, even when it would have decided the underlying statutory issue differently.); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. Rev. 43, 48 (2011). The Board's differing approach to arbitration when agreed to by unions versus individuals cannot stand. This Court has consistently allowed and enforced

waivers of the right to strike, which waive employees' rights to engage in concerted activity, where a "no-strike" clause was part of a freely negotiated collective bargaining agreement. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) ("Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."); *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 238-39 (1970) (exclusive bargaining representative may waive Section 7 rights of the employees it represents in exchange for other concessions); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-83 (1956) (same). This Court even implied an agreement not to strike where a collective bargaining agreement contains an arbitration provision. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

In these cases, this Court expressly held arbitration to be procedural in nature. It should do so here, in the context of individual workplace disputes, because neither the NLRA nor FAA bars employees from contracting to modify the procedures by which they will resolve disputes about substantive rights.

B. The FAA Applies to Independent Employment Contracts, Even in Cases Involving Statutory Claims

To the extent that an employment contract contains an arbitration clause, the FAA provides special protection as a matter of substantive federal law, reflecting congressional favor of this form of alternative dispute resolution. *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) ("The Act, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable

in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."). *See also AT&T Mobility*, 563 U.S. at 339 ("Section 2 reflects a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract.'") (citations omitted). The FAA generally applies to contracts of employment except those involving "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

In enacting the FAA, Congress's primary concern was resolution of individual claims: "[T]he FAA's legislative history indicates that Congress was opening the door to a particular *kind* of non-judicial dispute resolution proceeding, and class arbitration is a different kind of proceeding—apart from its non-judicial nature, it has little in common with what Congress approved in 1925." David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007). In this regard, congressional testimony by FAA proponents described arbitration as "face to face" in nature and prompt, inexpensive, and procedurally streamlined. *Id.* at 59-60. Arbitrations followed this individual model for most of their existence.

As such, employees and employers may agree to resolve wage-and-hour and other statute-based disputes in arbitration. In *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006), the plaintiff asserted a Fair Labor Standards Act (FLSA) wage claim against her employer, arguing that a binding arbitration provision in her employment contract was

unconscionable because it precluded class actions. *Id.* The Eleventh Circuit rejected that argument, on the principle that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition.'" *Id.* (citation omitted). Other courts came to the same conclusion.[2]

This Court has considered the interaction of the FAA with other federal statutes that provide substantive causes of action, and in each case, so long as aggrieved individuals can pursue their claims in arbitration, there is no diminution in the substantive rights offered by the statutes. *See Circuit City*, 532 U.S. at 123 (arbitration required of claims arising out of California's Fair Employment and Housing Act and state common law tort claims); *Gilmer*, 500 U.S. at 26 (federal age discrimination claim was arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (antitrust claims arising

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[2] *See Slawienski v. Nephron Pharm. Corp.*, No. 1:10-CV-0460-JEC, 2010 WL 5186622, at *3 (N.D. Ga. Dec. 9, 2010) (plaintiffs pursuing FLSA claims in an attempt to collect allegedly unpaid overtime wages are bound by arbitration, notwithstanding argument that mandatory arbitration was an unfair labor practice under the NLRA); *Grabowski v. C. H. Robinson Co.*, 817 F. Supp. 2d 1159, 1169 (S.D. Cal. 2011) ("[T]he NLRA does not operate to invalidate or otherwise render unenforceable the arbitration provisions of the Bonus Incentive Agreements [containing a class-action waiver] signed by Plaintiff."); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 377 (6th Cir. 2005) (statutory claims may be the subject of an arbitration agreement, including claims under the FLSA); *Winn v. Tenet Healthcare Corp.*, No. 2:10-CV-02140-JPM, 2011 WL 294407, at *2 & n.2 (W.D. Tenn. Jan. 27, 2011) (finding FLSA claim subject to arbitration and collecting cases reaching same conclusion); *Aracri v. Dillard's, Inc.*, No. 1:10-CV-253, 2011 WL 1388613, at *4 (S.D. Ohio Mar. 29, 2011) (same).

out of the Sherman Act are arbitrable). For example, in *Gilmer*, the Court considered whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. 500 U.S. at 23. The Court upheld the arbitration agreement, finding that nothing in the text of the ADEA forbade resolution by arbitration, and that such resolution presented no inherent conflict with the purposes of the ADEA. *Id.* at 26.[3] *See also Bender v. A. G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (sexual harassment claims under Title VII are arbitrable); *Weeks v. Harden Mfg. Corp.*, 291 F.3d 1307, 1313 (11th Cir. 2002) ("Courts have consistently found that claims arising under federal statutes may be the subject of arbitration agreements and are enforceable under the FAA.").

This Court similarly held that arbitration contracts in the employment context present no conflict with the Sherman Act, the Securities Exchange Act of 1934, the Racketeering Influenced and Corrupt Organizations Act, and the Securities Act of 1933. The bottom line is that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, 473 U.S. at 637 (addressing the Sherman Act); *see also Circuit City*, 532 U.S. at 123 ("[A]rbitration agreements can be enforced under the

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[3] *Cf. Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821, 823 (8th Cir. 2003) ("The [United States Supreme] Court upheld the arbitrability of federal age discrimination claims in *Gilmer* . . . and the age discrimination statute there at issue had borrowed its remedial provisions from the previously enacted FLSA.").

FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " (citation omitted)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 222 (1987) (arbitration upheld with regard to Securities Act of 1934 and RICO claims); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (upholding arbitration of claims arising under the Securities Act of 1933).

These decisions reflect the Court's consensus that individual resolution of claims in arbitration provides full relief to claimants. This premise follows from the general rule regarding collective adjudication: The substantive rights at issue in a lawsuit are not altered by aggregating claims, such as in class action litigation. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.' " (citation omitted)); *Microsoft Corp. v. Baker*, 582 U.S. ___, No. 15-457, slip op. at 4 (June 12, 2017) (Thomas, J., concurring in the judgment) (Class "allegations are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class.") (citation omitted).

For example, the elements of a tort claim remain the same regardless of whether plaintiffs proceed

individually or jointly, in a unified trial or in separate bifurcated proceedings. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978). Similarly, changing the rules for proof of damages depending on whether a lawsuit is brought on behalf of an individual plaintiff or aggregates many plaintiffs in a class action would improperly alter substantive rights. *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977); *see also* James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.").

The FAA and the federal substantive law of arbitration protect individual rights to freely choose the method of dispute resolution, in the workplace and elsewhere. The NRLB's determination to eliminate this individual right cannot be countenanced.

II

INDIVIDUAL ARBITRATION OF WORKPLACE DISPUTES IS BOTH COMMON AND FAIR

A. Empirical Studies Show That Individual Arbitration Has Fair Results

Suspicion against an arbitral forum is unwarranted on the mere basis that arbitration operates under procedures that differ from court rules. *14 Penn Plaza*, 556 U.S. at 269 ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of

arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. In fact, arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).[4]

Studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system." *Id.* at 480-81 n.87 (citing David Sherwyn, *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1564 (2005)). Multiple studies have found that workers who pursue their claims in arbitration prevail more frequently than those who pursue their claims in court. *See* Rutledge, *Whither Arbitration?*, 6 Georgetown J. of L. and Pub. Poly at 551 ("arbitration generally results in higher win rates and higher awards for employees than litigation"); Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008).

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[4] Arbitration is only one means of alternative dispute resolution. Mediation is used more frequently than arbitration, by a wide measure. Peter B. Rutledge, *Whither Arbitration*, 6 Geo. J. L. & Pub. Pol'y 549, 555 (2008) (citing multiple studies).

One study found that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower. Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005). Another study of construction industry arbitration found that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall." Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (internal citations omitted)). Thus, employees reasonably may prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (noting potential benefits for employees in pursuing arbitration given the harsh results presented by the court system).

When arbitration is equally likely to end in a just result as a lawsuit, it cannot be deemed "unfair" for employees to arbitrate employment disputes on an individual basis.[5] Therefore, it is not "unfair" for

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[5] Class actions or arbitrations should not be presumed to offer any particular advantages either, given that many class actions result in a settlement of minimal value to class members, much of which is unclaimed given the need for class members to complete affirmative steps to obtain their remedy. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in*

(continued...)

employees and employers to contract for that specific, individual method of arbitration.

B. An Employer's Requirement of Individual Arbitration of Workplace Disputes Should Be Viewed in the Same Manner as Any Other Potential Trade-Off

The FAA directs courts to place arbitration agreements on equal footing with other contracts, and it "does not require parties to arbitrate when they have not agreed to do so." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002), a directive that applies with equal force to class arbitration. Meanwhile, people do not have any fundamental right to work for a specific employer. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Kubik v. Scripps College*, 118 Cal. App. 3d 544, 549 (1981) (upholding mandatory retirement for university professors in part because "there is no fundamental right to work for a particular employer, public or private"). Thus, in looking for a job, applicants consider the various perceived benefits and burdens of each particular employment opportunity.

While the FAA demands that courts apply a neutral view of the availability of arbitral remedies, individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov & Beverly A. Aloisio, *Arbitration of Employment Disputes Before and After* Circuit City, 17 Lab. Law. 327, 343 n.151

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[5] (...continued)
Antitrust and Consumer Class Action Litigation, 49 U.C.L.A. L. Rev. 991, 994 (2002).

(2001) (noting questions of bias where employers are repeat players in arbitration, and further noting that unions also are repeat players, representing workers under collective bargaining agreements). In this way, an arbitration requirement is no different than many other job requirements that affect individual preferences, and even legally protected rights.

When contemplating where to work, job-seekers contemplate all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.[6] Employers may require workers to wear uniforms[7] or costumes,[8]

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[6] *See, e.g., Turco v. Hoechst Celanese Chem. Group, Inc.*,101 F.3d 1090, 1091 (5th Cir. 1996) (Plaintiff "worked a rotating shift, as there was no 'day shift' for any process operator, and was routinely required to work through the night."); *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1248 n.4 (5th Cir. 1992) ("Employees are assigned to four groups. Each group is required to work seven consecutive days in each shift: 7 a.m. to 3 p.m. (day shift); 3 p.m. until 11 p.m. (afternoon shift); and 11 p.m. to 7 a.m. (night shift).").

[7] *See, e.g., Commc'ns Workers of Am. v. Ector Cty. Hosp. Dist.*, 467 F.3d 427, 431 (5th Cir. 2006) ("Under the Hospital's established dress code policy, all employees were and are required to wear a uniform while on duty."); *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 302 (5th Cir. 1998) (delivery truck company employee drivers are required to wear a uniform).

[8] *See, e.g., Reich v. Circle C Invs., Inc.*, 998 F.2d 324, 330 (5th Cir. 1993) (noting that employee dancers, disc jockeys and waitresses wore "costumes and uniforms"); *Kutrom Corp. v. City of Center Line*, 979 F.2d 1171, 1171 (6th Cir. 1992) (health club masseuses required to wear "harem costumes"); *Hill v. Moskin Stores, Inc.*, 159 A.2d 299, 300 (Del. Super. Ct. 1960) (porter required to wear "snowman" costume and pass out candy to children outside the store).

refrain from certain personal adornments,[9] or stick to a script when speaking to customers.[10] Some employers demand a heavy travel schedule[11] or require workers to report for duty on holidays.[12] Potential

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[9] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135-36 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding that it would constitute an undue hardship to require Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification, given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aimed to cultivate).

[10] Scripted communications are standard practice in the telecommunications industry. *See* Patrick E. Michela, Comment, *"You May Have Already Won . . .": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. 553, 560 (1994) ("[T]elemarketers encourage, or sometimes require, fronters to read verbatim from a script provided by the telemarketer that is designed to induce the customer to buy the product or service being offered. A typical script allows the recipient of the phone call to ask questions and provide certain information to the salesperson. The script provides the fronter with different messages to read depending on the customer's responses to the questions posed by the fronter." (citations omitted)).

[11] *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 480 (5th Cir. 1986) (plaintiff's job "entailed extensive travel by helicopter to offshore drilling rigs where he inspected the rigs, showed safety films and spoke to groups of employees on subjects related to safety."); *Johnson v. RGIS Inventory Specialists*, 554 F. Supp. 2d 693, 705 (E.D. Tex. 2007) ("extensive travel was 'a contemplated, normal occurrence' of Johnson's employment at RGIS because she accepted the job with the understanding that she would be working in diverse store locations.").

[12] These include such public service industries as police officers, *Perry v. Ft. Lauderdale*, 352 So. 2d 1194, 1195 (Fla. Dist. Ct. App.

(continued...)

workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.

A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not require arbitration as a condition of employment. *See National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Guardtronic, Inc.*, 76 Ark. App. 313, 320 (2002) (party to a contract may voluntarily accept even non-negotiable provisions because the party remains free to take his business elsewhere); *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001) (noting, in discussion of procedural unconscionability, that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided). Class action arbitration waivers have been adopted by some companies, but they are far from universal. *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in The Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 348 (2007). Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified "employment contracts." About 63% of the employment contracts did not mandate

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[12] (...continued)
1977); *City of McAllen v. Zellers*, 216 S.W.3d 913, 914 (Tex. 2007), firefighters, *Miami v. Gioia*, 215 So. 2d 780, 782 (Fla. 1968); *Perrodin v. City of Lafayette*, 696 So. 2d 223, 224 (La. 1997), and hospital workers, *Lester v. Sec'y of Veterans Affairs*, 514 F. Supp. 2d 866, 876 (W.D. La. 2007), as well as certain private sector industries, *NLRB v. Houston Chronicle Publ'g. Co.*, 300 F.2d 273, 277 (5th Cir. 1962) (some newspaper employees work on holidays).

arbitration. *Id.*[13] Another study of employment contracts for senior executives found about 58% did not mandate arbitration of workplace disputes. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 Wash. & Lee L. Rev. 231, 234 (2006).

Employers may require a particular type of dispute resolution, but as a practical matter, this is no different than other aspects of employment that are not open to negotiation. For example, employers may offer a particular 401(k) matching plan, or a specific type of health insurance. These aspects of employment are determined unilaterally by the employer and a potential employee who is looking for a particular benefits package may have to shop around or may simply conclude that the ideal package is unavailable in his market. In viewing the wide variety of trade-offs that exists in the acceptance of any job, an individual who highly values class-based dispute resolution, or who does not want to arbitrate workplace disputes at all should not apply to work for a company that requires it.

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[13] Eisenberg and Miller also learned that arbitration clauses were more common in contracts that also had a choice-of-law provision specifying use of California law. *Id.* at 358-61. *See also* Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L. Rev. 1475, 1522 (2010) (comparing New York's contract law approach to arbitration as "formalistic, literalistic, nonjudgmental, and deferential to the freedom of parties to bargain for mutual advantage" with California courts' approach that elevates judge's perceptions of "context, morality, and fairness" over "the written agreement of the parties.").

C. In Stark Contrast to Individual Arbitration, Class Arbitration Creates More Problems than it Solves

Class arbitration simply did not exist until very recently, *AT&T Mobility*, 563 U.S. at 348, and is generally considered an awkward hybrid procedure. "Courts addressing the concept of class actions in arbitration have largely contemplated a continued, significant judicial role in overseeing key aspects of the class arbitration under a hybrid approach, in order to protect the rights of the absent members." *See* Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711, 1764 n.224 (2006) (acknowledging a hybrid class arbitration procedure whereby a court certifies a class and then orders an arbitration to proceed on a class-wide basis, citing *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309 (1986)); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991) ("[W]e find that this class action, if properly certified, may continue through arbitration on a class-wide basis. We therefore remand to the trial court for class certification proceedings. After this ruling, the trial court must compel arbitration."). In response to this new hybrid procedure, this Court issued important guidance to lower tribunals as to how class arbitration procedures should be viewed in relation to traditional, individual arbitration. Where parties have contracted for individual arbitration, imposing class arbitration effects a "fundamental change" to the parties' agreement. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010). Class arbitration "no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes

between hundreds or perhaps even thousands of parties," including absent parties. *Id.* The parties' expectations about privacy and confidentiality in individual arbitration are also "potentially frustrat[ed]" when disputes are litigated on a class-wide basis. *Id.* Perhaps most critically, class arbitration drastically raises the stakes "even though the scope of judicial review is much more limited." *Id.*; *see also* Linsday R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. Chi. Legal F. 631, 649 (class procedure "subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration").

In *AT&T Mobility*, 563 U.S. at 344, the Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." This Court distinguished class arbitration from individual arbitration on both structural and policy grounds. As a structural matter,

> [c]lasswide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.

Id. at 348. The Court then identified three policy reasons why class arbitration should not be imposed

upon non-consenting parties, and why class arbitration in general is an inferior method of dispute resolution than individual arbitration: First, class arbitration is "slower, more costly, and more likely to generate procedural morass." *Id.* Second, class arbitration *requires* procedural formality if members of the class are to be bound by the result. These procedural formalities would have to include requirements that "class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id.* at 349 (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985)). Third, class arbitration greatly increases risks to defendants because the absence of multilayered review makes it more likely that errors will go uncorrected. *AT&T Mobility*, 563 U.S. at 350. That is, if an arbitrator errs in the resolution of an individual employee's claim, defendant companies can accept that potential cost; but if the error occurs in a case involving potentially tens of thousands of employees with aggregated claims, the defendant companies will be pressured into settling questionable claims rather than bet the company on the outcome of the essentially unreviewable arbitration. *Id.* (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds*, 571 F.3d 672, 677-78 (7th Cir. 2009)) (describing the risk of "in terrorem" settlements in class actions).

Parties to a contract may reasonably decide to avoid these pitfalls in favor of individual arbitration, and the courts should respect that freedom of choice.

III

THE NLRB'S POLICY OF NONACQUIESCENCE UNDERMINES OUR CONSTITUTIONAL STRUCTURE

This Court can determine that arbitration contracts do not implicate, much less violate, the "concerted action" provision of the NLRA without determining whether agency policies of nonacquiescence are constitutional in all their varieties. *See* Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 Minn. L. Rev. 1339, 1351 (1991) (intracircuit nonacquiescence vulnerable to separation of powers, due process, and equal protection challenges). However, the NLRB's persistent invocation of its policy of nonacquiescence provides an important context to the question directly presented in this case.

Nonacquiescence refers to the "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals." Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). The NLRB, "more than most [agencies], has openly asserted the authority to decline to acquiesce." *Id.* at 706. The Board is committed to pressing its own view of the law until the Board itself or this Court overrules it; it claims that piecemeal acceptance of particular circuits' interpretations of the law would frustrate its development of a national labor policy. *Id.* at 706 (citing *Insurance Agents' Int'l Union*, 119 N.L.R.B. 768, 773 (1957)). The Board's sole nod to the rule of law established by federal courts is with regard to an

appellate court's "treatment of a particular case on remand." *Id.* at 706 n.148.

Decisions by federal courts hold no sway over the NLRB and its administrative law judges (ALJs) in light of the NLRB's "policy of non-acquiescence" that instructs ALJs to follow Board precedent rather than the precedent of courts of appeals. *See, e.g., Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) ("We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence."); *Sheet Metal Workers' Int'l Ass'n, Local 15, AFL-CIO v. NLRB*, 491 F.3d 429, 435 (D.C. Cir. 2007) (NLRB refuses even to recognize the existence of circuit court decisions contrary to its own policies.).

Other agencies may invoke a policy of nonacquiescence as well. For example, like the NLRA, the Immigration and Naturalization Act provides for appellate review in such a way that Immigration Judges cannot know for certain which court of appeals will review their decisions. *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1093-94 (7th Cir. 1994). In *Rosendo-Ramirez*, the Immigration and Naturalization Service (INS), urged the Seventh Circuit to apply the law of the Fifth Circuit, which adopted the INS's position, while disregarding the Seventh Circuit's own decision in *Leal-Rodriguez v. INS*, 990 F.2d 939 (7th Cir. 1993), which rejected the INS's position. The *Rosendo-Ramirez* court interpreted INS's argument as "an inartful (or maybe in fact cleverly disguised) attempt at nonacquiescence to [the] rule in *Leal-Rodriguez*." 32 F.3d at 1093. The court declined to adopt the INS's proposal.

District of Columbia Circuit Chief Judge Abner Mikva decried the United States Railroad Retirement Board's policy of nonacquiescence that led it to deny benefits to the spouses and widows of railroad workers even after multiple appellate courts held that denial to be unlawful. *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1083 (D.C. Cir. 1992) ("In a bold challenge to judicial authority, the United States Railroad Retirement Board argues that it is free, when it chooses, to ignore the decisions of United States courts of appeals."). The Retirement Board declined to petition this Court for review of adverse circuit court rulings while continuing to apply the rejected interpretation of its controlling statute. *Id.* at 1087. *See also id.* at 1092 ("When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The Railroad Retirement Board has done neither."). The Board—and the decision below (Pet. App. 7a)—applied *Chevron* deference[14] to the agency interpretation. The *Johnson* court held that *Chevron* deference does not apply because the Board was "not interpreting its governing statute alone, but rather the relationship between" the governing statute and another federal statute (the Social Security Act). *Id.* at 1088. Moreover, a policy of nonacquiescence creates an inherently non-uniform application of the law because it "results in very different treatment for those who seek and who do not seek judicial review." *Id.* at 1092. *See also Ruppert v. Bowen*, 871 F.2d 1172, 1178 (2d Cir. 1989) (noting the Social Security Administration's "history of uncooperativeness" in its

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[14] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

failure to follow circuit court decisions); *cf. Atchison, Topeka and Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 446 (7th Cir. 1994) (en banc) (without Supreme Court review, "nonacquiescence may yield entrenched differences among the circuits") (Easterbrook, J., concurring).

The Environmental Protection Agency (EPA) also issued a directive adhering to a judicially-invalidated interpretation of the Clean Air Act. *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014). The case involved an EPA regulation broadly defining what constitutes a "major" source of pollution. *Id.* at 1002. The Sixth Circuit, in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 740-41 (6th Cir. 2012), held that the EPA's definition was "arbitrary and capricious" and then denied the EPA's petition for rehearing. The EPA continued to apply its own definition everywhere outside the Sixth Circuit. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1003. The D.C. Circuit found "no merit in EPA's arguments" and struck down the directive to ignore *Summit*. *Id.* at 1004, 1011 ("The doctrine of intercircuit nonaquiescence does not allow EPA to ignore the plain language of its own regulations" that require uniformity.) *See also id.* at 1010 (EPA could have petitioned this Court to review *Summit* but failed to do so). EPA responded to the D.C. Circuit opinion by amending its regulations to provide an exception to the uniformity requirement and "fully accommodate intercircuit nonacquiescence." *Amendments to Regional Consistency Regulations*, 81 F.R. 51102-01, 51103, 2016 WL 4089445 (Aug. 3, 2016).

The NRLB used the nonacquiescence doctrine in this case to bide its time until it could convince just one

federal court to adopt its position, even after multiple other courts that declined to do so. It steadfastly refused to petition this Court to answer the question of whether the NRLA forbids class action waivers in arbitration contracts until the Epic Systems and Ernst & Young petitions forced its hand. The Court now has the opportunity to opine on the legitimacy of the Board's practice of rejecting federal court decisions in favor of its own policies as well as holding that employers and employees may agree to individual arbitral resolution of workplace disputes without running afoul of the NRLA.

CONCLUSION

The National Labor Relations Board "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *S. S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). The Federal Arbitration Act's protection of individual freedom of choice when it comes to contracting for arbitral resolution of disputes is just such an important Congressional objective. The Court should reverse the decision below to uphold workers' and employers' freedom of contract.

DATED: June, 2017.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org

RECORD AND BRIEFS

AUG 16 2017

Nos. 16-285, 16-300, and 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORP.,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *ET AL.*,
Petitioners,
v.
STEPHEN MORRIS, *ET AL.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING RESPONDENTS IN NOS. 16-285 AND 16-300, AND PETITIONER IN NO. 16-307

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

August 2017

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Fed. R. Civ. P. 23 8

INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a non-profit consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements. It advocates for legislation and regulations concerning the use of arbitration agreements in consumer and employment contracts, and it has appeared as amicus curiae in this Court and others in many cases involving arbitration. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). Public Citizen's attorneys have also represented parties in many cases involving such issues in this Court and other federal and state courts. Among other cases, Public Citizen attorneys argued *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), both of which figure prominently in the briefing in these cases.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. General letters of consent to the filing of amicus briefs from counsel for all parties are on file with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Critical to the outcome of this case is whether the Federal Arbitration Act (FAA) requires enforcement of employer-employee arbitration agreements that contain provisions preventing employees from engaging in concerted activity for mutual aid and protection. As the briefs of the National Labor Relations Board (NLRB) and the individual employees who are parties to these cases demonstrate, engaging in collective litigation efforts (whether through joinder, class actions, statutory collective actions, or litigation by employee organizations) falls easily within the plain meaning, purpose, and judicial and administrative construction of the scope of concerted activity under the federal labor laws. Contracts in which employers seek to forbid employees to engage in such activity are thus unenforceable under section 3 of the Norris-LaGuardia Act (NLGA), 29 U.S.C. § 103, and illegal under section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1).

Public Citizen does not intend to reiterate the arguments of the parties demonstrating that concerted legal proceedings fall within the scope of protection of the NLRA and NLGA. However, Public Citizen believes that further discussion of the issue whether the FAA requires enforcement of provisions in arbitration agreements that interfere with the right to engage in concerted activity may be of assistance to the Court.

The argument that the FAA permits arbitration agreements to do what other contracts cannot—negate rights protected by federal statute—depends heavily on the proposition that a federal law may only "override" the FAA if it expressly prohibits enforcement of

arbitration agreements. That view, however, rests on a line of precedent that has no application here, involving whether particular statutes altogether prohibit arbitration of claims arising under them. This case involves no assertion that any type of claim cannot be arbitrated, nor any other challenge to arbitration per se; it concerns only a conflict between a particular term in an arbitration agreement and specific statutory rights that enforcement of that term would infringe. The FAA does not mandate enforcement of a contractual provision that violates such specific rights merely because it is part of an arbitration agreement.

Indeed, this Court has repeatedly stated that the FAA does not operate to deprive parties to arbitration agreements of statutory rights, such as the fundamental right to engage in concerted activity at issue here. That understanding of the FAA—that it operates as a forum-selection provision without otherwise altering the rights of the parties—strongly supports the conclusion that the NLRA, NLGA, and FAA are best harmonized by a holding that, while employers and employees may agree to arbitrate claims, the FAA neither requires nor permits arbitration agreements that would interfere with the right to engage in concerted activity under the NLRA and NLGA. By contrast, a holding that subordinated statutory rights conferred by the NLRA and NLGA to provisions in arbitration agreements would perversely open the door to the inclusion of other unlawful provisions in arbitration agreements—including, for example, agreements that purported to bar employees from reporting grievances to the NLRB.

The proper reading of the statutes is confirmed by the FAA's "saving clause," which provides that arbitration agreements are not enforceable to the extent there are grounds at law or in equity for setting them aside that apply equally to non-arbitration agreements. 9 U.S.C. § 2. The NLRA and NLGA provisions that render contracts that infringe the right to engage in concerted activity unenforceable fall readily within the terms of the saving clause, as they establish rules of both law and equity that are applicable not merely to arbitration agreements, but to any contract between employers and employees protected by the federal labor laws. The principles that make arbitration agreements that preclude concerted activity unenforceable do not single out arbitration agreements for unfavorable treatment, but apply evenhandedly to a broad range of illegal employer conduct.

Nor can the NLRA's and NLGA's protections be cast aside on the theory that they are incompatible with the nature of arbitration and thus interfere with achievement of the FAA's purposes and objectives. That theory has no place in this case, because it is derived from concepts of implied federal preemption of state law, which do not determine the relationship of two or more federal laws: Federal statutes, unlike state laws, may and often do limit the achievement of the objectives of prior federal statutes. In any event, concerted activity is not incompatible with arbitration of workplace disputes. The two have coexisted comfortably for more than eight decades, particularly since the enactment of the NLRA. This Court can give full effect to the NLRA's and NLGA's protection of concerted activity without in any way destroying the essential attributes of workplace arbitration.

ARGUMENT

I. The FAA does not require enforcement of provisions of an arbitration agreement that infringe workers' statutory rights to engage in concerted activity.

The Acting Solicitor General and the employers in each of these cases argue that contractual terms that would otherwise be unenforceable and unlawful are, under the FAA, enforceable if included in an arbitration agreement. That argument rests in large part on the assertion that under decisions of this Court such as *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), statutes that do not "expressly prohibit arbitration" do not "displace" the FAA. *E&Y* Pet. Br. 22; *see also Epic* Pet. Br. 16–18. According to the Acting Solicitor General, these precedents teach that the FAA's "presumption" that an arbitration agreement is enforceable can be "overcome" only by a "specific congressional command" that "address[es] arbitration agreements *in particular*." SG Br. 18.

These arguments rely on a line of cases that address a different problem and rest on reasoning inapplicable to the issue posed by this case. In *CompuCredit* and most other precedents cited by the employers and the Acting Solicitor General, the issue was whether the FAA requires enforcement of an agreement to arbitrate a private right of action created by a federal statute. This Court had originally interpreted the FAA as not applying generally to rights of action created by federal statutes because it viewed the ability to access a court for resolution of statutory claims as part and parcel of the rights created by the statute creating the right of action. *See Wilko v. Swan*, 346 U.S. 427, 433–38 (1953). But beginning with *Scherk v. Alberto-Culver*

Co., 417 U.S. 506 (1974), and continuing with a string of cases from the 1980s onward, the Court adopted a different view: that arbitration involves a choice of forum that the FAA authorizes parties to make, and courts to enforce, for a broad range of claims.[2]

Given the Court's construction of the FAA as a general authorization of arbitration of both common-law and statutory claims, the Court has adopted the view that if Congress, acting against the backdrop of that statutory authorization, creates a right of action, courts should generally infer an intent that the claim will be subject to arbitration. *See CompuCredit*, 565 U.S. at 98. Accordingly, in evaluating arguments that particular types of statutory claims are not subject to compelled arbitration under the Act, the Court has looked for a "congressional command" to "overrid[e]" the FAA and exempt them from arbitration. *Id.* As a corollary, the Court has held that the language Congress commonly uses to create a right of action does not by itself constitute a command that the right cannot be subject to arbitration under the FAA. *See id.* at 100–01. Thus, the Court has looked for specific indications that Congress intended to exclude a particular type of claim from arbitration, *see id.* at 103–04, although it has not necessarily insisted on statutory language that addresses arbitration agreements expressly.

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[2] *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 428 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 & n.10 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); *CompuCredit*, 565 U.S. at 101–02.

Those principles, however, have no bearing on the issue in this case, which does not involve an argument that a statute creating particular rights of action prohibits their arbitration. Indeed, the issue here is not whether *any* type of claim is or is not subject to arbitration. The NLRB, and the employees, do not here claim that the NLRA or NLGA "overrides" the FAA by categorically exempting from arbitration claims asserted by employees under those statutes or any others.[3] The principle that the creation of a right of action does not "override" the FAA absent a more specific congressional command thus has no application here.

Rather, the issue in this case is whether a particular feature of an arbitration agreement—its prohibition of concerted action—violates rights to engage in concerted action specifically granted by other federal statutes. The line of cases exemplified by *CompuCredit* does not address such an issue. Nor has the Court ever addressed the circumstance where one element incorporated in an arbitration agreement—but not the requirement of arbitration as such—directly conflicted with a right granted by a federal statute. To the extent they have touched on the point, however, the Court's opinions strongly indicate that the employers and Acting Solicitor General are wrong to assert that the FAA requires enforcement of parts of an arbitration agreement that conflict with a statutorily created right unless the statute creating the right specifically addresses its application to arbitration.

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[3] Of course, the statutes at issue—the NLRA and NLGA—do not create the rights of action asserted by the employees in the *Epic* and *Ernst & Young* cases. Indeed, the provisions of those statutes relevant here do not create private rights of action for individual employees against employers.

In particular, this Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), although cited by the employers and Acting Solicitor General as supporting their views, suggests a very different approach from the one they advocate. In *Italian Colors*, parties challenging an arbitration agreement's class-action ban asserted that the provision violated nonwaivable rights to engage in collective litigation under the antitrust laws and Federal Rule of Civil Procedure 23. If the view of the Acting Solicitor General and the employees were correct, the Court would have had to go no further to reject the argument than to point out that neither the antitrust laws nor Rule 23 refer specifically to arbitration.

But that approach is not the one the Court took. Instead, the Court examined the antitrust laws and Rule 23 and concluded that they did not in fact create a *right* to engage in collective litigation that could not be waived by a private agreement. *See id.* at 2309–10. The Court's mode of analysis strongly signals that, had the Court found a federal statutory basis for the claimed right, it would have sufficed to establish a "congressional command" that would overcome the otherwise applicable principle that courts will enforce agreements establishing "the rules under which ... arbitration will be conducted." *Id.* at 2309 (citation omitted).

Here, where the relevant statutes expressly grant workers a right to engage in concerted action—a right that encompasses collective legal proceedings and is not subject to waiver in employment agreements—the analysis of *Italian Colors* thus supports the conclusion that the FAA does not require enforcement of provisions of an arbitration agreement that violate that right.

II. The FAA is best read together with the NLRA and NLGA to preserve workers' right to engage in concerted activity.

That the FAA does not negate the right to engage in concerted activity under federal labor laws finds further support in the Court's repeated statements that the FAA itself does not operate to deprive parties to arbitration agreements of substantive rights. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2310; *Pyett*, 556 U.S. at 266; *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Waffle House*, 534 U.S. at 295 n.10; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *McMahon*, 482 U.S. at 229–30; *Mitsubishi*, 473 U.S. at 637 n.19.

The Court has stated this proposition in explaining that arbitration of a statutory right of action is not inconsistent with the statute creating the right, as long as the arbitration agreement allows a party to obtain relief on the statutory claim and thus "satisfies the statutory prescription of civil liability in court." *CompuCredit*, 565 U.S. at 101. But the insight underlying the Court's statements—that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum," *Mitsubishi*, 473 U.S. at 628—has broader application. The principle that a party "relinquishes no substantive rights" when agreeing to arbitrate, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008), is as applicable where, as here, a particular provision of an arbitration provision *directly* infringes a statutory right as it is when the provision interferes with the right by not permitting relief for claims based on the statute.

In light of this Court's consistent statements that the FAA does not limit rights otherwise granted by statute, and its implicit recognition in *Italian Colors* that the FAA does not require enforcement of provisions in an arbitration agreement that would violate statutory rights, a holding that the FAA does not authorize enforcement of provisions in an arbitration clause that infringe a worker's statutory right to engage in concerted activity represents "the best way to harmonize the statutes." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237 (2014). That view gives all of the relevant statutes ample scope: It permits enforcement (subject to applicable contract-law principles) of agreements between workers and employers providing for arbitration of any otherwise arbitrable claim, and prohibits only enforcement of particular provisions within an arbitration agreement that would interfere with the right to engage in concerted action by preventing any form of collective legal action. Such a reading treats "each statute as effective because of its different requirements and protections," *id.* at 2238 (quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001)), and gives each "its own scope and purpose." *Id.*

The contrary view of the employers and the Acting Solicitor General, under which provisions in arbitration agreements that violate otherwise applicable statutory rights must be enforced unless the statute creating the right "address[es] arbitration agreements *in particular*," SG Br. 18, would produce incongruous "result[s] that Congress likely did not intend." *POM Wonderful*, 134 S. Ct. at 2239. For example, as the employees' briefs have pointed out, that view suggests that the FAA would require enforcement of provisions in arbitration agreements that would otherwise violate Title

VII's prohibitions on race and sex discrimination—for example, provisions requiring male arbitrators in cases involving claims of sexual harassment or discrimination asserted by women employees, or white arbitrators in cases brought by African-American employees—because Title VII does not explicitly say it applies to procedural provisions in arbitration clauses.

Perhaps a bit closer to home on the facts of this case, the employers' and Acting Solicitor General's position would seemingly call for the enforcement of an arbitration agreement that provided that it was the sole remedy for any claims involving unfair labor practices and thus purported to preclude a worker from complaining to the NLRB about such practices. The NLRA expressly prohibits employers from retaliating against workers who file unfair labor practice charges, 29 U.S.C. § 158(a)(4), and this Court (as well as the NLRB) has long recognized that "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board." *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967). Thus, "it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges." *Id.* (citing cases).

These fundamental prohibitions of the NLRA, however, are no more express or specific in their application to arbitration agreements than is the protection for concerted activity. Thus, a ruling in this case that the FAA requires enforcement of a prohibition on concerted legal proceedings in the face of the NLRA and NLGA would similarly indicate that an arbitration clause could displace an employee's right to complain about unfair labor practices to the NLRB.

Importantly, the notion that an employer would seek to use an arbitration agreement in such a manner is far from fanciful. Employers have already argued in other cases that filing unfair labor practice charges breaches arbitration agreements. *See, e.g., Fallbrook Hosp. Corp. v. Cal. Nurses Ass'n*, 652 F. App'x 545 (9th Cir. 2016); *Hosp. of Barstow, Inc. v. Cal. Nurses Ass'n*, 2013 WL 6095559 (C.D. Cal. Nov. 9, 2013), *app. dism'd*, No. 13-57131 (9th Cir. July 2, 2014). Although the courts in those cases saw no merit to the argument that a provision in an arbitration agreement could displace a right conferred by the NLRA, a decision by this Court that the arbitration agreements here are enforceable would, at a minimum, cast significant doubt on those rulings. And without question, employers willing to use arbitration to displace the labor laws' protection of concerted activity and free themselves from accountability in collective legal proceedings would be just as eager to use arbitration to excuse themselves from having to account for their actions before the Board.

III. The FAA's saving clause reinforces the conclusion that the FAA does not displace workers' rights under the NLRA and NLGA.

Because the relevant statutes are best read together to preclude enforcement of a provision in an arbitration clause that interferes with the right of workers to engage in concerted activity, this Court need not consider the effect of the FAA's "saving clause," found in the final phrase of 9 U.S.C. § 2. Consideration of the clause, however, underscores that the illegality and unenforceability of a provision of an arbitration clause under the NLRA and NLGA renders that provision unenforceable under the FAA as well.

A. The labor laws' prohibition on enforcement of contracts that interfere with concerted activity provides "grounds [that] exist at law or in equity for the revocation of any contract" within the meaning of the saving clause.

The saving clause "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting 9 U.S.C. § 2). The NLRA's and NLGA's provisions rendering contracts interfering with the right to engage in concerted action illegal and unenforceable fall straightforwardly within the description of the "grounds" the saving clause establishes for denying enforcement to a provision in an arbitration agreement.

The employers and the Acting Solicitor General, however, contend that a "saving clause" in a federal statute is somehow, by nature, inapplicable to another federal law, but can only "save" a state law. *See Epic* Pet. Br. 20; *E&Y* Pet. Br. 34; SG Br. 31. (At the same time, the Acting Solicitor General acknowledges that nothing in the FAA's language supports that view. *See* SG Br. 31.) But generalities about saving clauses do not determine the effect of the FAA's language.[4] "Saving clause" is not a rigidly defined legal term of art, and it is even not a term used in the FAA itself; it is a label of convenience applied by this Court to the relevant language in section 2 of the FAA. That language, not the

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[4] As the respondents' brief in the *Epic* case demonstrates, the employers' and Acting Solicitor General's argument is wildly inaccurate even as a matter of the conventional, generic usage of the term "saving clause." *See Epic* Resp. Br. 38.

label "saving clause," determines the effect of the statute.

The language of section 2 looks to "such grounds as exist in law or in equity," not to whether the source of those legal or equitable grounds is federal or state authority. The NLRA's prohibition of contracts interfering with the exercise of protected rights is surely a "ground" that "exist[s] in law." And the NLGA's prohibition on enforcement of contracts that interfere with concerted activity explicitly establishes grounds for denying enforcement of contracts both at law and in equity. *See* 29 U.S.C. § 103 (providing that contracts violating the public policy protecting concerted action "shall not afford any basis for the granting of legal or equitable relief").

The employers and Acting Solicitor General, however, assert that the NLRA and NLGA do not render "any contract" unenforceable, but only contracts to which they apply. That contention, however, would be equally applicable to *all* legal or equitable principles affecting the validity or enforceability of contracts. The argument would thus render the saving clause virtually meaningless. Its interpretive error lies in its confusion of the requirement that a ground for revocation under the saving clause be applicable to "any contract" with a requirement that the ground be applicable to "*every* contract." As a simple matter of English usage, the NLRA and NLGA fall within the saving clause because they provide a ground for setting aside "any contract" in which an employer purports to interfere with the right of covered employees to engage in concerted activity within the meaning of the federal labor laws.

The employers' "any contract" argument not only finds no support in the plain meaning of the statutory

language, but is also foreclosed by this Court's decisions. The Court has considered the scope of the saving clause in a string of decisions going back to *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and as recent as *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017), and given it a meaning incompatible with the contention that a principle must be broadly applicable to every contract to render an arbitration clause unenforceable under the saving clause. Under this Court's longstanding construction, the "such grounds as exist at law or in equity for the revocation of any contract" language "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 583 U.S. at 339 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).[5] As the Court stated this past Term in *Kindred*, the clause "establishes an equal-treatment principle" that allows courts to inval-

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[5] The suggestion of the employers in *Epic* that the saving clause applies only to defenses relating to a narrow understanding of the "making" of an agreement, *Epic* Pet. Br. 28, is flatly at odds with this Court's repeated recognition that the saving clause broadly incorporates defenses to the "validity of arbitration agreements." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006); *see also Concepcion*, 563 U.S. at 339; *Kindred*, 137 S. Ct. at 1426. The argument also reads critical words out of section 2, including "enforceable" and the key word "revocation," which are not specific to contract formation. This Court has accordingly read the FAA provisions that allow parties to enforce arbitration provisions (sections 3 and 4) not to "substantively restrict[]" section 2's enforceability provisions. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

idate arbitration agreements on the basis of legal defenses to contract enforcement if those rules are not "tailor-made to arbitration agreements" and do not "singl[e] out those contracts for disfavored treatment." 137 S. Ct. at 1426, 1427.

The legal and equitable grounds at issue here are not specific to arbitration agreements in that sense and, thus, are protected by the saving clause. The NLRA and NLGA prohibit enforcement of employer-employee contracts that interfere with workers' exercise of the right to engage in concerted activity regardless of whether the contracts involve arbitration, or even whether the contracts involve resolution of legal disputes at all. Thus, the statutes would render unenforceable a contract that, while not requiring arbitration, purported to prohibit employees from pursuing collective legal actions in court. But they also have much broader application: They invalidate all manner of potential contracts through which an employer might seek to interfere with concerted activity—from the traditional "yellow dog" contract prohibiting employees from joining a union, to efforts to prevent such activities as distribution of newsletters and protests of working conditions, *see Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565–66 (1978); *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 14–15 (1962), to twenty-first-century contracts seeking to prevent employees from engaging in "inappropriate" discussions on Facebook and other social media platforms. *See, e.g.*, *Three D, LLC v. NLRB*, 629 F. App'x 33 (2d Cir. 2015).

The breadth of the types of contracts covered by the NLRA and NLGA principles at issue refutes any suggestion that they are "too tailor-made to arbitration agreements ... to survive the FAA[]." *Kindred*, 137 S.

Ct. at 1427. Unlike the state-law rule targeting arbitration that the Court held to be outside the saving clause in *Kindred*, these principles cannot possibly be characterized as establishing an "arbitration-specific ... rule, much as if [they] were made applicable to arbitration agreements and black swans." *Id.* at 1428. Far from applying merely to arbitration agreements and a "slim set of ... utterly fanciful [non-arbitration] contracts," *id.* at 1427, the protection of concerted activity applies to a great range of common employer conduct—including the practice of requiring employees to sign arbitration agreements that waive the right to engage in concerted activities. That breadth qualifies them as generally applicable contract defenses under the saving clause and this Court's decisions construing it.

B. The rights created by the NLRA and NLGA cannot be displaced on the theory that they interfere with fundamental attributes of arbitration.

Notwithstanding the text of section 2 and this Court's cases addressing it, respondents and the Acting Solicitor General contend that application of the NLRA's and NLGA's protection of concerted activity to arbitration clauses would "interfere with fundamental attributes of arbitration," SG Br. 32–33 (quoting *Concepcion*, 563 U.S. at 344), and they invoke *Concepcion*'s observation that the saving clause does not "preserve *state-law* rules that stand as an obstacle to the accomplishment of the FAA's objectives," SG Br. 32 (quoting *Concepcion*, 563 U.S. at 343) (emphasis added).

As the Acting Solicitor General himself acknowledges, however, that observation does not govern this case because it reflects the application of the saving clause in the context of implied preemption of *state-law*

contract principles. *Id.* at 33. The Court's implied preemption doctrine condemns state laws that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). That doctrine is controversial even in its application to state laws, *see Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment), and it is quite clear that it does not control the relationship between two federal laws, *see POM Wonderful*, 134 S. Ct. at 2236.

Congress, unlike the states, is fully empowered to enact statutes limiting the extent to which other federal laws accomplish their full purposes. And because "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987), it is natural to look to other enactments (particularly subsequent ones) as expressions of "legislative choice" concerning "what competing values will or will not be sacrificed to the achievement of a particular objective," *id.* Thus, where, as here, federal statutes establish generally applicable grounds for non-enforcement of a contract, the FAA's saving clause supports application of those grounds to provisions in an arbitration agreement, without the conflict-preemption-based overlay of considering whether doing so would interfere with "fundamental attributes of arbitration."[6]

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[6] Indeed, if the NLRA and NLGA *were* viewed as incompatible with essential features of arbitration, such a conflict with a previously enacted law would constitute an implied repeal (or an express repeal in the case of the NLGA, *see* 29 U.S.C. § 115), and for that reason the labor laws would still have to be given effect rather than the FAA. *See POM Wonderful*, 134 S. Ct. at 2237 (noting that a later statute impliedly repeals an earlier one if they are in irreconcilable conflict).

In any event, no interference with fundamental attributes of arbitration would result from a ruling that employers may not consign employees protected by the NLRA and NLGA to individual arbitration as their exclusive means of resolving legal disputes arising out of their employment. The contrary argument of the employers and Acting Solicitor General rests on this Court's statements in *Concepcion* and *Italian Colors* that limiting arbitration to "bilateral" proceedings is essential to preserving the speed, informality, low costs, and low stakes that the Court there saw as "fundamental" to the "benefits" of consumer and commercial arbitration. *See Concepcion*, 563 U.S. at 347–51; *Italian Colors*, 133 S. Ct. at 2312. But *Concepcion* itself recognizes that the nature of arbitration procedures may vary with "the type of dispute." 563 U.S. at 344. Regardless of whether bilateral proceedings are a fundamental attribute of consumer or commercial arbitration, that is not and has never been true of workplace arbitration.

As this Court has long emphasized, the critical attributes that make workplace arbitration desirable are substantially different from those of commercial arbitration because "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). Arbitration of workplace disputes developed as an *expression* of workers' right to engage in concerted legal activity, not as a means of suppressing it. Both before and after the enactment of the NLRA, arbitration was widely adopted in collective bargaining agreements as a preferred mechanism for resolving workplace grievances. *See, e.g., United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36–37 (1987); Amicus Br. of

Ten Int'l Labor Unions, *et al.*, 28–31. Such arbitration by nature involves concerted activity, with unions representing both individual workers and large groups of workers in resolving workplace disputes.[7]

This Court long ago held that arbitration agreements in collective bargaining agreements are judicially enforceable, *see Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957), and soon thereafter issued its decisions in the "*Steelworkers Trilogy*," affirming a strong federal policy in favor of enforcement of such agreements.[8] The Court's decisions make clear that the fundamental attributes of workplace arbitra-

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[7] By contrast, individual arbitration of workplace disputes is a relatively recent phenomenon, largely postdating this Court's interpretations of the FAA in *Gilmer* and *Circuit City*. Before the 1991 decision in *Gilmer*, the issue whether claims under federal statutes governing employment were arbitrable was disputed. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Moreover, before *Circuit City*, whether the FAA even applied to employment contracts was uncertain, as employment contracts not deemed to involve interstate commerce fell entirely outside the FAA's scope. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956). And those that involved interstate commerce were, until relatively recently, widely thought to fall within the statute's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce," 9 U.S.C. § 1; *see Circuit City*, 532 U.S. at 129–30 (Stevens, J., dissenting) (citing cases). *Circuit City*'s conclusion that the FAA exception is limited to cases involving transportation workers, together with *Gilmer*'s approval of arbitration of statutory employment-law claims, gave rise to widespread use of arbitration for individual employment claims, as well as collective ones.

[8] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Warrior & Gulf*, 363 U.S. 574; *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion are quite different from those the Court has subsequently ascribed to commercial arbitration.

"In the commercial case, arbitration is the substitute for litigation. [In labor cases,] arbitration is the substitute for industrial strife." *Warrior & Gulf*, 363 U.S. at 578. Workplace arbitration has therefore rested not on perceived needs for streamlined and exclusively bilateral dispute resolution, but on a preference for mechanisms of "industrial self-government" that allow resolution of questions arising between groups of workers and their employers by mutually trusted, expert arbitrators familiar not only with governing legal principles, but also with the practices of the industry and the "common law of the shop." *Id.* at 581–82. Assertions that concerted activity is incompatible with the fundamental nature of workplace arbitration, or that employers will not choose arbitration unless they can use it as a means of prohibiting collective action, run counter to the entire history of workplace arbitration since enactment of the NLRA.[9]

To be sure, allowing employers to enforce contracts requiring employees to use bilateral arbitration to resolve purely *individual* disputes because of the advantages employers perceive in "streamlined proceedings." *Concepcion*, 563 U.S. at 344, may also serve the purposes of the FAA as they are currently understood

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[9] Although the Court's earliest decisions relied on section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, as the basis for the courts' power to enforce arbitration provisions in collective bargaining agreements (because at the time the FAA's application to employment contracts and to statutory claims generally was in doubt), *see Lincoln Mills*, 353 U.S. at 456, it has subsequently treated such provisions as involving arbitration within the meaning of the FAA, *see Pyett*, 556 U.S. at 254, 265, 269 n.10.

and may be consistent with federal labor law as well. But where *collective* grievances are at issue, precluding enforcement of arbitration agreements that prohibit concerted activity not only gives effect to the labor laws' protection of that activity, but also preserves what has historically been the primary advantage of arbitration in the employment context—its usefulness as a means to foster "industrial peace" and as a "substitute for industrial strife," *Warrior & Gulf*, 363 U.S. at 578, through the resolution of workplace disputes on a collective rather than individual basis. By allowing both for individual arbitration of purely individual disputes, and for enforcement of arbitration agreements that allow concerted activity for disputes involving multiple employees, the NLRA and NLGA amply preserve the "fundamental attributes" of workplace arbitration.

CONCLUSION

For these reasons, as well as those set forth in the briefs of the NLRB and the employee parties, the Court should affirm the judgments of the courts of appeals in Nos. 16-285 and 16-300, and reverse the judgment of the court of appeals in No. 16-307.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

August 2017

RECORD AND BRIEFS

FILED
JUN 16 2017

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth, Seventh, and Ninth Circuits

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENT IN NO. 16-307

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

(Additional captions on inside cover)

ERNST & YOUNG LLP, AND ERNST & YOUNG U.S. LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., ET AL.,
Respondents.

QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an individual to arbitrate claims against an employer on an individual, rather than collective, basis.

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INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC files amicus briefs on behalf of the retail industry in the cases of greatest importance to retailers.

The members of the RLC have a strong interest in the outcome of this proceeding. Relying on the legislative policy reflected in the Federal Arbitration Act ("FAA"), and this Court's consistent endorsement of the federal policy favoring arbitration, many of the RLC's members and affiliates enter into arbitration agreements with their employees. They do so because arbitration allows all parties to resolve disputes quickly

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

Among other things, these agreements typically require that arbitration be conducted on an individual, rather than a class or collective, basis. As this Court explained in *AT&T Mobility LLC v. Concepcion*, collective resolution of claims on an aggregate or class-wide basis is "not arbitration as envisioned by the FAA" and "lacks its benefits"—the simplicity, informality, and expedition that are characteristics of arbitration. 563 U.S. 333, 351 (2011).

The National Labor Relations Board ("Board") has taken the position that individual arbitration agreements with employees are unfair labor practices under the National Labor Relations Act ("NLRA"). That position, if it were to prevail, would invalidate an important aspect of millions of arbitration agreements, to the detriment of both employers and employees. This petition presents the question whether the Board's position is correct. The members of the RLC therefore have a strong interest in this proceeding.

SUMMARY OF ARGUMENT

The employers in this case correctly argue that the Board's decision is irreconcilable with the Federal Arbitration Act. In this brief, the RLC demonstrates that the Board's decision cannot stand for an additional reason: its interpretation of the NLRA is unreasonable and is not entitled to deference.

The NLRA protects employees' rights to engage in "concerted activities," but class actions are not "concerted activities." Rather, one employee prosecutes a lawsuit, and, assuming the procedural requirements for class certification are satisfied, the rest of the employees await the outcome of the litigation. An employee who does nothing but wait for a settlement check is not engaging in "concerted activities." Class actions, which are procedural mechanisms for the efficient resolution of numerous claims, do not resemble the "concerted activities" the NLRA's drafters had in mind, which included unionization and otherforms of substantive, genuine employee collaboration.

Prohibiting enforcement of arbitration agreements in the name of the NLRA would also conflict with the NLRA's purposes. Section 1 of the NLRA explains that Congress intended to promote the goals of workers' "freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. Class actions do not advance these goals. If anything, they undermine them, by vesting power in an unelected class-action representative—or more realistically, an unelected class-action lawyer.

Further, if the Court upholds the Board's decision, an employee's right to bring a class action will depend on procedural rules adopted by courts—over which the Board has no control. Yet the reason the NLRA was enacted—and the reason the Board exists—is to establish a single set of federal rules governing labor relations.

The Board's interpretation of the NLRA is particularly implausible because class actions did not exist at the time of the NLRA's enactment. Accordingly, Congress could not possibly have intended the NLRA to protect the right to pursue a class action. And when Rule 23 was adopted, it was a *procedural* addition to the Federal Rules of Civil Procedure. The Board exceeded its authority by transforming Rule 23 into a *substantive* right under the NLRA.

Although the Board's decision would *reduce* the Board's authority in the aforementioned way by delegating authority vested in the Board to federal and state courts, the Board's decision would *increase* the Board's authority in a different way. Under the Board's decision, plaintiffs have a right under federal labor law to bring class actions under federal employment statutes like the Fair Labor Standards Act ("FLSA") and Title VII—even though those statutes do not themselves protect a right to pursue class actions, and even though the Board lacks authority to interpret and enforce those statutes. Neither of these adjustments in the Board's authority were contemplated by Congress.

Not only does the Board's decision unduly expand the scope of its power with respect to statutes adminstered by other agencies, but the decision trenches on the authority of federal courts. The Board's decision permits collateral attacks on federal court decisions enforcing arbitration agreements—in direct contravention of bedrock separation-of-powers principles. And permitting such collateral attacks creates yet another constitutional problem: by

punishing employers who file successful motions to dismiss class action lawsuits, the Board's decision violates the Petition Clause.

In addition to conferring a right on workers that the NLRA does *not* guarantee, the Board's decision strips workers of rights that the NLRA *does* guarantee. In particular, the Board's bar on individualized arbitration agreements strips employees of their statutory right to enter into binding agreements in which they agree to refrain from concerted activities and to resolve disputes with their employers individually. The Board cannot justify stripping workers of their statutory rights by relying on the Norris La-Guardia Act, as that statute is irrelevant to the question presented here.

Finally, the Board's decision is not entitled to *Chevron* deference. The Board has no particular expertise in class action practice. Nor did the Board purport to apply its expertise—rather, it imported Rule 23 and other pre-existing class action rules into the NLRA. *Chevron* deference is unwarranted when, as here, the Board interferes with the enforcement of statutes over which it has no direct control.

ARGUMENT

The RLC agrees with the employers[2] that the Board's interpretation of Section 7 of the NLRA conflicts with the Federal Arbitration Act. In this brief, the RLC advances an alternative, equally compelling, argument: even if the Federal Arbitration

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[2] The "employers" refer to Petitioners in Nos. 16-285 and 16-300 and Respondent in No. 16-307.

Act had never been enacted, the Board's interpretation of the NLRA is incorrect. Class actions do not constitute "concerted activities" within the meaning of the NLRA. The Board's interpretation of the NLRA is so plainly contrary to the NLRA's text, history, and purpose that it could not be sustained under any standard of deference. But should the Court decide the applicable standard of deference, it should hold that the Board's decision should be reviewed *de novo*, because the justifications for *Chevron* deference are absent.

I. The Board's Interpretation of Section 7 of the NLRA is Incorrect.

Section 8(a)(1) of the NLRA, 29 U.S.C. §158(a)(1), states: "It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA. Section 7, 29 U.S.C. §157, states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Board concluded that class action lawsuits constitute "concerted activities for the purpose of ... other mutual aid or protection" within the meaning of Section 7. Pet. App. 31a-35a.[3] That conclusion contradicts the text of the NLRA, has no basis in its history, and would cause results directly contrary to the purpose of the NLRA.

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[3] "Pet. App." refers to the appendix to the Board's petition for a writ of certiorari in No. 16-307.

A. The Unilateral Filing of a Class Action Does Not Constitute "Concerted Activities."

Section 7 of the NLRA enumerates those employee "concerted activities" that are covered by the NLRA. "Concerted activities" means the activities of employees working in concert—that is, working *together*. If one employee is engaging in "activities," while representing a second employee who is sitting by passively, the two employees are not working in *concert*—even if the one employee's activities might benefit the other.

This straightforward textual interpretation finds support in the "maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (brackets and quotation marks omitted). When employees "form, join, or assist labor organizations," 29 U.S.C. §157, they work together to form a united front against management. Similarly, when employees "bargain collectively through representatives of their own choosing," *id.*, the employees work together to choose representatives—for instance, by taking a vote—and the representative is vested with bargaining authority on behalf of the whole group through that group's collective action. By the same token, the phrase "other concerted activities" should be construed to refer to the activities of multiple employees working together.

In keeping with that interpretation, the Board has consistently ruled that employees who are *working together* to bring a lawsuit are engaging in protected activity. For instance, in *Altex Ready Mixed Concrete*, 223 N.L.R.B. 696, 700 (1976), the Board held that when a union filed a "lawful court action," and multiple employees executed "form affidavits" in support of that court action, the employees were engaging in protected "concerted activit[ies]." The Fifth Circuit upheld the Board's decision, holding that the affidavits "were filed in support of the union's petition for injunction in state court" and that "filing by employees of a labor related civil action is protected activity under section 7 of the NLRA." *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-97 (5th Cir. 1976). Thus, a lawsuit filed by a union—which, in turn, is the product of employees working in concert—was protected activity.

Even absent union involvement, the Board has found the prosecution of a lawsuit to be concerted activity—but only when multiple employees worked together. For instance, in *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 949 (1942), the Board held that "the joining of ... three union members in [a] suit constituted concerted activity protected by the Act." Similarly, in *Salt River Valley Water Users. Ass'n*, 99 N.L.R.B. 849, 853-54 (1952), the Board held that the discussion and circulation of a petition designating an employee as an agent in an FLSA suit was "concerted activity." In upholding the Board's ruling, the Ninth Circuit emphasized that "[c]oncerted activity may take place where one person is seeking to induce action from a group," and that "[b]y soliciting signatures to the

petition," the employee "was seeking to obtain such solidarity among the [other employees] as would enable the exertion of group pressure." *Salt River Valley Water Users Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953). Critical to these holdings was that all of the employees who stood to benefit from the litigation were collaborating together, and it was the act of *collaboration* that constituted the "concerted activities" protected by the NLRA.

Class actions, however, do not involve employees working together. The very definition of a class action is a case in which all employees *cannot* work together. Under Federal Rule of Civil Procedure 23(a)(1), a class can be certified only if "the class is so numerous that joinder of all members is impracticable"—that is, it is impracticable for all of the employees to collaborate together in the suit. Thus, a class representative prosecutes the suit, while representing the interests of other employees, who are not required to be named plaintiffs—or even to participate in the litigation—in order to recover damages. *See Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (noting that class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"); Pet. App. 148a (Member Johnson, dissenting) (explaining that "an opt-out class action may be initiated and litigated by an individual employee from start to finish without *any action* whatsoever by other employees" (emphasis in original)). Those class members need not engage in any activities at all; they cannot be said to be engaging in "concerted activities" with the class representative.

There are certain activities that a class member can undertake—but they are not "*concerted* activities" with the class representative. A putative class member may opt out of the class action. Fed. R. Civ. P. 23(c)(3)(B). Alternatively, a class member may stay in the class, but object to the settlement. Fed. R. Civ. P. 23(c)(2)(B)(iv); *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). Under those circumstances, the class member is working to undermine the class action, either by reducing the class's economic power or by countering the litigation decisions of the class representative. Those activities are the antithesis of "concerted activities" because they pit employee against employee. Yet the NLRA's purpose is to promote employee collaboration, not employee infighting. As explained below, *infra* at 15, Congress expressly characterized the NLRA's goal as "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. That goal is antithetical to a class action, where employees other than the class representatives have no say in whether a class is certified—and once the class is certified, their sole options are either to do nothing, or to undermine the class action that is supposedly representing their interests.

Similarly, "collective actions" under the Fair Labor Standards Act do not involve "concerted activities." Unlike class actions, collective actions require opting in, rather than opting out. When a Fair Labor Standards Act collective action is conditionally certified, the "consequence ... is the sending of court-approved written notice to employees, who in turn become

parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) (internal citations omitted). But that act of opting in is insufficient to satisfy the "concerted activities" requirement. Once the employee files a letter with the court, the named plaintiff is entitled to represent that employee's interests. Even though she may ultimately benefit from the suit, there is no requirement that she engage in concerted activities with the named class representative or any other employee.

Of course, in real-world class and collective actions, employees other than the named plaintiffs may participate in the litigation. They may be subpoenaed, participate in discovery, or testify at trial. Importantly, however, the Board's decision that class and collective actions constitute concerted activity did *not* depend on the fact that some (but not all) nonparty employees would actively participate in the litigation. Rather, the Board concluded that if a named plaintiff represents other employees, that representation *in and of itself* constitutes protected, concerted activity, because in the Board's view, the named plaintiff necessarily acts in concert with the employees that she represents. Or put another way: In the Board's view, even if the employee class member does not do anything and instead sits by passively, the mere act of being represented by the named plaintiff satisfies the "concerted activities" requirement. That ruling is incorrect. The mere act of *representing* someone does

not amount to engaging in *concerted activities* with that person.[4]

In reaching its contrary conclusion, the Board relied (Pet. App. 55a) on this Court's decision in *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). That case, however, addressed a very different scenario. In *City Disposal Systems*, the Court held that an employee's invocation of a right in a collective bargaining agreement constituted concerted activity. The Court reasoned: "Obviously, an employee could not invoke a right grounded in a collective bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective bargaining agreement if individual employees could not invoke the rights thereby created against their employer. ... It was just as though [the employee] was reassembling his fellow union members to reenact their decision not to drive unsafe trucks." *Id.* at 832.

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[4] For similar reasons, naming multiple class representatives does not transform the entire class action into concerted activity protected by the NLRA. Many class and collective actions have multiple named plaintiffs. In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for instance, the 1.5 million class members were represented by three named plaintiffs. But that does not mean that the class action *as a whole* constituted concerted activity. Had the three named plaintiffs in *Wal-Mart* brought an action as co-plaintiffs, but not tried to certify a class, they might have been engaging in concerted activities *with each other*. But they were not engaging in concerted activities *with the class members* merely by virtue of having sought to represent them.

That reasoning does not apply here. The class representative does not rely on a collective bargaining agreement; rather, she relies on Federal Rule of Civil Procedure 23 or another applicable class or collective action procedural mechanism. Those rules, however, were not collectively bargained. Bringing a class action suit therefore does not "reassembl[e]" any collective decision. *Id.*

The more pertinent precedent is *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Prill was a truck driver who was concerned about the safety of his employer's trucks. *Id.* at 1482. He contacted the Tennessee Public Service Commission, and was subsequently fired. *Id.* The Board held that firing Prill did not violate the NLRA, and the D.C. Circuit upheld the Board's decision. It deferred to the Board's view that "if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement." *Id.* at 1483. Rather, "concerted activities" refer to "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Id.* at 1484 (quotation marks omitted). The Circuit Court distinguished *City Disposal Systems* on the ground that "a worker's actions are concerted when tied to the actions of his fellow employees, and in *City Disposal* [*Systems*], the collective bargaining agreement itself provided the bond between one worker and another." *Id.*

The Board did not purport to overrule the doctrine affirmed in *Prill*—indeed, the Board cited that case with approval. Pet. App. 42a-43a & n.42. And *Prill*'s reasoning applies to this case. An employee who unilaterally files a class action lawsuit may be acting for the benefit of his fellow employees, and his fellow employees' inclusion in the class may result in economic pressure on the employer. But given that the other employees are not *acting*, there are no concerted *activities* within the meaning of the NLRA.

The Board's position is especially odd because class actions are not permissible at the Board itself. The Board does not follow the Federal Rules of Civil Procedure, but instead follows its own Rules & Regulations, which contain no provision for employees to file a charge as a class. The Board thus apparently believes that the right to file a class action is a substantive right conferred by the NLRA—while the Board simultaneously denies employees that "substantive right" in the Board's own proceedings.

B. The Board's Interpretation of Section 7 Undermines the NLRA's Purposes.

In addition to violating the statutory text, the Board's decision conflicts with the NLRA's purposes, both as explained in the NLRA's preamble and as further elaborated by this Court.

i. The Board's Decision Undermines the NLRA's Purposes, as Explained in the NLRA's Preamble.

Section 1 of the NLRA, 29 U.S.C. §151, sets forth Congress's "Findings and declaration of policy" in

enacting the NLRA. It emphasizes the harms resulting from the "inequality of bargaining power" between employees and employers, and sets forth the goal of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. §151.

The Board's decision does not advance these goals. First, a court does not certify a class based on whether certification would advance the purpose of remedying any "inequality of bargaining power." It certifies a class based on whether the procedural requirements for class certification, such as numerosity, commonality, and typicality, are satisfied.

Second, when the class is certified, it doubtless has greater "bargaining power," due to the risk of ruinous liability for the employer if the class prevails. But that is not the goal of class actions: the goal of class actions is to create a procedural device that efficiently aggregates claims that may be resolved through representative evidence. As explained in further detail below, *infra* at 21-22, Rule 23 is lawful *precisely because* it regulates procedure, not substance; the fact that "some (even many) plaintiffs will be induced to sue by the availability of a class action" is a mere "incidental effect" of the rule. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) (quotation marks and brackets omitted). Creating a right to bring class actions as a means of effectuating "bargaining power" reflects a

cynical view of the class action that is inconsistent with the bedrock principle that Rule 23 is a procedural rule.

Third, class actions do not advance "freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. §151. A class member is not exercising her right to "freedom of association," merely because she is being represented by a named plaintiff. Nor is a unilateral action by a named plaintiff the result of "self-organization." And employees are not engaging in the "designation of representatives of their own choosing" when a plaintiff files a class action. To be sure, employees in collective actions must opt in, and employees in class actions have the option of opting out. But the mere decision to opt into a collective action—or to acquiesce to being a class member rather than opting out of a class action—reflects neither "freedom of association" nor "designation of representatives" of the employees' "own choosing," when the employees played no role in the selection of the named plaintiff—or the named plaintiff's lawyer—in the first place.

The class action procedure is antithetical to the collective employee activity that Congress had in mind when it enacted the NLRA.

ii. The Board's Interpretation of Section 7 Undermines the NLRA's Purpose as Elaborated by This Court.

The Board's interpretation of Section 7 of the NLRA undermines the NLRA's overall purposes in an

additional respect: It contradicts the NLRA's purpose of ensuring a single national rule for labor relations.

The Board held that an employee's right to pursue a class action is limited to the procedures that are "otherwise available ... under statute or rule." Pet. App. 60a. Applying this rule means that, in states where class action rules are narrow, employees' Section 7 rights to pursue class actions are correspondingly narrow; in states where class action rules are broader, employees have a Section 7 right to take advantage of those broader procedures. If Rule 23 is broadened or narrowed, an employee's Section 7 right to pursue a class action is broadened or narrowed right along with it. Moreover, in some cases, the right to pursue a class action is broader in federal court than in state court, even for the same cause of action. *See, e.g., Shady Grove*, 559 U.S. at 398-99 (plurality opinion) (holding that plaintiff could pursue class action alleging violation of New York statute in federal court, even though New York law barred such actions in state court). In such cases, the Board's decision would mean that Section 7 protects the right to file the class action in federal court, but not in state court.

Congress clearly did not intend this result. The NLRA reflects a view that "centralized administration of specially designed procedures [were] necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490 (1953). As such, the Board's interpretation of the NLRA—until now—has

always been centralized. In assessing the scope of the right to unionize or collectively bargain, the Board would never import the procedural rules enacted by a state court—and thereby allow the scope of the NLRA's protections to vary from jurisdiction to jurisdiction.

To the contrary, this Court has held that "when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of [the NLRA]," "state jurisdiction must yield." *Int'l Longshoreman's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 389 (1986) (quotation marks omitted). Indeed, even when it is not "clear whether the particular activity regulated by the States was governed by [the NLRA]," courts "are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 389-90 (quotation marks omitted).

Importing Rule 23 into the NLRA, however, transforms courts into the "primary tribunals" to decide workers' substantive rights under the NLRA. Under the Board's view, workers in some states have a broad right to engage in "concerted activity," while workers in other states have a narrower right to engage in "concerted activity"—all based on the local procedural rules governing class actions in those states, over which the Board has no expertise or authority.

C. Section 7 Cannot Reasonably Be Interpreted to Confer a Right to Invoke a Procedural Rule that Did Not Exist at the Time of Section 7's Enactment.

The history of class action lawsuits confirms that they are not "concerted activities" under the NLRA.

The NLRA was enacted in 1935. Modern class action practice did not begin until Rule 23 was enacted in 1966. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999). The drafters of the NLRA could not have imagined modern class action practice. It is therefore improper to interpret the phrase "concerted activities" to encompass the right to file a class action. *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute" (citation omitted)).

Of course, the NLRA is not limited to the "specific set of circumstances that may have precipitated its passage." *United States v. Rodgers*, 466 U.S. 475, 480 (1984). To the contrary, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

Yet class actions are not even "reasonably comparable," *id.*, to the concerted activities that Congress could have contemplated when the NLRA

was enacted. They are fundamentally different from the types of collective litigation that then existed. The Board observed that "[g]roup litigation ... has long been part of Anglo-American legal tradition," Pet. App. 61a-62a, but such group litigation has involved multiple employees working *together* (for instance, in a jointly-filed lawsuit). The Board cited no authority that unilateral lawsuits on behalf of a class, of the sort Rule 23 now authorizes, existed in 1935, or that it is remotely plausible that Congress might have intended to include such lawsuits within the meaning of "protected activity."

The Board attempted to justify its approach on the ground that there were some "ways in which employees would be able to engage in protected efforts to improve their working conditions" that did not yet exist in 1935. Pet. App. 61a. The Board gave the example of the use of "social media," such as "Facebook," to "pursue unionization." But there is a difference between Facebook and a class action. If two employees discuss unionization on Facebook, it is the *discussion*—not the use of Facebook—that is protected. Such a discussion is directly analogous to a face-to-face discussion of unionization that would have indisputably constituted protected activity in 1935. By contrast, modern class actions have no 1935 analog.

D. The Board's Decision Violates the Rules Enabling Act.

The Rules Enabling Act provides that the Federal Rules of Civil Procedure—such as Rule 23—cannot expand a litigant's substantive rights. Yet the Board's decision, in effect, holds that Rule 23 *does* expand a

litigant's substantive right—in direct contravention of the Rules Enabling Act.

The Board characterized the right to pursue a class action as a *substantive* right under the NLRA. Pet. App. 41a-42a. This characterization was the critical premise behind the Board's holding: "Because mandatory arbitration agreements ... purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid." Pet. App. 43a.

But the supposed substantive right to pursue a class action has a unique feature that distinguishes it from other rights protected by the NLRA, such as the right to collectively bargain. The Board's decision holds that an employee's substantive rights extend to whatever class action procedures are "otherwise available to [the employee] under statute or rule." Pet. App. 60a. This means that in the early years following the NLRA's enactment, before the enactment of Rule 23, the substantive right to pursue a class action under the NLRA *did not exist*; if the Board is correct, this substantive right sprang into existence upon Rule 23's enactment decades after the NLRA was enacted.

When Rule 23 was ultimately enacted, however, it was enacted as a new *procedural* rule. This Court has been emphatic that Rule 23 is not a substantive right: "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Indeed, Rule 23 could not have been adopted under the Rules Enabling Act *unless* it was a procedural rule. *See Shady Grove*, 559 U.S. at 407-08

(plurality opinion) (upholding Rule 23 under Rules Enabling Act because it does not "abridge, enlarge, or modify any substantive rights," but instead "enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits" and "leaves the parties' legal rights and duties intact and the rules of decision unchanged" (quotation marks omitted)).

Thus, the Board's decision violates not only the FAA, as the employers contend, but also the Rules Enabling Act. Under the Board's interpretation of the NLRA, Rule 23's enactment ushered in a new substantive right to pursue a class action that could override the FAA—which is precisely what the Rules Enabling Act holds that Rule 23 cannot do. The Board erred in transforming a *procedural* mechanism for aggregating claims into a *substantive* right that overrides other provisions of federal law.

E. The Board's Decision Impermissibly Expands the Board's Power.

The Board's decision impermissibly extends its jurisdiction over statutes that it has no right to administer. The Board has no authority to interpret or enforce the statutes commonly litigated in employment cases. For instance, it has no authority over federal employment discrimination statutes, which did not even exist until decades after the NLRA was enacted; rather, that authority lies with the Equal Employment Opportunity Commission. Likewise, it is the Department of Labor, not the Board, that has authority over the Fair Labor Standards Act. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2162 (2012). Yet the Board's interpretation of the

NLRA confers upon employees the substantive right to pursue class actions under those statutes—thus radically affecting the manner in which they are enforced.

The Board's decision not only arrogates power reserved to other agencies, but also arrogates power reserved to Congress. This Court has repeatedly held that claims arising under employment discrimination statutes can be arbitrated. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that Congress did not preclude arbitration of claims arising under the Age Discrimination in Employment Act). It has rejected the view that private-plaintiff class actions are necessary to the enforcement of those statutes, noting that the EEOC retains the power to seek class-wide relief. *Id.* at 32 (rejecting the argument that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for ... class actions" and pointing out that "arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide ... relief"). Yet the Board's decision overrules Congress's decision not to confer a right to class actions in the ADEA, by indirectly conferring a right to employment class actions through the NLRA.

The Board's decision also steps on the toes of the federal courts. In the *Murphy Oil* case, the Board vindicated what was, in effect, a collateral attack on a judicial decision. The employee filed her NLRB charge after the federal district court dismissed her class action lawsuit. She argued that Murphy Oil's enforcement of the arbitration clause through a

successful motion to dismiss constituted an unfair labor practice. Pet. App. 27a. The Board vindicated this collateral attack on the district court's decision by finding that Murphy Oil's motion—which the district court *granted*—violated the NLRA. Even more remarkably, the Board ordered Murphy Oil to pay the employee's attorney's fees incurred in connection with Murphy Oil's successful motion. Pet. App. 85a (ordering Murphy Oil to reimburse the employee for "all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration"). The Board's decision to, in effect, override the judgment of a federal court raises serious separation of powers concerns.

It also raises concerns under the Petition Clause. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011). In *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), this Court was confronted with a decision by the Board holding that objectively reasonable lawsuits by an employer could violate the NLRA, so long as they were filed with a retaliatory purpose. *Id.* at 536. The Court noted that the Board's interpretation of the NLRA presented a "difficult constitutional question" as to whether it impermissibly deterred employers from exercising their Petition Clause right to file lawsuits. *Id.* at 534. It therefore avoided that difficult question by adopting a narrow interpretation of the NLRA: "reasonably based but unsuccessful suits" cannot

violate the NLRA, even if filed "with a retaliatory purpose." *Id.* at 536. In this case, Murphy Oil's motion was not only "reasonably based," but *successful*, yet Murphy Oil was still punished for it. The serious constitutional questions raised by that result is grounds enough for rejecting the Board's interpretation.

In the *Epic Systems* and *Ernst & Young* cases, the Board did not punish the employer for pursuing the motion to dismiss; rather, the federal court held that the employer's motion to dismiss should be denied, deferring to the Board's position that individualized employee arbitration agreements are unlawful. Thus, those courts applied the rule of law that the mere filing of an otherwise-meritorious motion is a substantive violation of an employee's rights. That result presents a Petition Clause concern: the employer's otherwise-meritorious motion was denied because of the Board's position that a successful motion to dismiss would violate the NLRA.

And it presents an additional separation-of-powers concern. The Board ordinarily cannot act without a party filing a charge: under Section 10(b) of the NLRA, the Board may declare that an unfair labor practice has occurred "[w]henever it is charged that any person" has violated the NLRA. 29 U.S.C. §160(b); *see also Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (Board cannot act *sua sponte*). Yet by declaring class action waivers unlawful, the Board announced a new rule which would be applied *without* a charge being filed. The *Epic Systems* and *Ernst & Young* lawsuits illustrate the effect of the Board's new rule: in those cases, the courts of appeals rejected the

defendants' efforts to enforce arbitration agreements because enforcing them would purportedly violate the NLRA, even though the Board was not a party to those cases. If this Court affirms the Seventh Circuit and Ninth Circuit, that same result will recur nationwide, contrary to the limitations on the Board imposed by Congress.

II. The Board's Decision Conflicts with Other Aspects of Federal Labor Law.

The Board's decision not only recognized a right to a class action that does not exist under the NLRA, but it strips workers of other rights expressly conferred by the NLRA. Further, contrary to the Board's suggestion, the Norris-La Guardia Act does not require arbitration agreements to be invalidated.

A. The Board's Decision is Inconsistent with Employees' Statutory Right to Resolve Disputes Individually.

Section 7 of the NLRA not only protects an employee's right to engage in concerted activities; it also protects each employee's right to "refrain from any or all of such activities." 29 U.S.C. §157. Yet as a dissenting Board member explained, Pet. App. 94a n.13, 116a, 124a-125a, the Board's decision is a ban on an employee's voluntary decision to enter into an individualized arbitration agreement with an employer, thereby nullifying the employee's right to refrain from class actions. Of course, even under the Board's decision, an employee could voluntarily agree to arbitrate a claim, and forego a class action, even after a dispute arises. But it is frequently in an employee's

interest to sign a bilateral arbitration agreement in advance, to guarantee that the employee benefits from arbitration's speed and efficiency. Ironically, the Board's decision would strip employees of their right to enter into a binding commitment not to engage in the supposedly concerted activity of class action litigation.

Similarly, Section 9(a) states that "any individual employee ... shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative." 29 U.S.C. §159(a). The legislative history confirms that this provision was intended to protect an employee's right to litigate and settle disputes on an individualized basis. H.R. Rep. No. 80-245, at 34 (1947) (rejecting Board's prior position that union representative "has the right to take over the grievances," and noting that Section 9(a) "permits the employees and their employer to settle the grievances"); S. Rep. No. 80-105, at 24 (1947) (the "employee's right to present grievances exists independently of the rights of the bargaining representative"). Yet the Board's position strips the employee of this right to enter into a binding agreement under which the employee would individually resolve a dispute with an employer. The employee cannot sign away this right to file a class action, even if she wants to.

And she may well want to. This Court has repeatedly emphasized that employees, like employers, have legitimate reasons for arbitrating claims. Arbitration is an inexpensive and speedy way of resolving disputes. *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."). Speed and informality are particularly beneficial in employment cases. *Circuit City*, 532 U.S. at 123 ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."). And agreeing to an arbitration agreement may be necessary for an employee to obtain a higher salary—or to be hired in the first place, given that in some cases, the likely costs of even a remotely potential class action might make the hiring of additional employees unprofitable. Yet the Board has transformed the NLRA into a straightjacket, under which employees are banned from signing an individualized arbitration agreement. That policy is inconsistent with the NLRA's bedrock principle of employee autonomy.

B. The Board's Decision is Inconsistent with the Norris-La Guardia Act.

The Board also "look[ed] to" the Norris-La Guardia Act for support, while acknowledging that its interpretation of that Act was not entitled to deference. Pet. App. 48a. Citing a law review article for support, the Board concluded that the Norris-La Guardia Act invalidated arbitration agreements with class waivers. Pet. App. 48a-50a. The Board's position was incorrect.

The Norris-La Guardia Act states, in relevant part, that employees shall be "[f]ree from the interference, restraint, or coercion of employers of labor, or their

agents, in ... self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and bars "any undertaking or promise ... in conflict with" this public policy. 29 U.S.C. §§102, 103. The purpose of this provision was to prevent so-called "yellow dog contracts," *i.e.*, "agreements stating that the workers were not and would not become labor union members." *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 534 (1949).

The comparison to an arbitration agreement is absurd. An arbitration agreement does not inhibit unionization. Unionized employees who sign arbitration agreements are not inhibited, in any way, from collectively bargaining through their unions.

The Norris-La Guardia Act also divests courts of power to enjoin any person from participating in a strike. It prohibits courts from issuing an injunction "in any case involving or growing out of any labor dispute" that would prohibit persons from engaging in numerous types of protected activities. 29 U.S.C. §104. These protected activities include participating in a strike; being a member of a labor organization; or offering assistance to striking employees. *Id.* The purpose of this provision was "to remedy the growing tendency of federal courts to enjoin strikes." *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoreman Ass'n*, 457 U.S. 702, 708 (1982).

Enforcing arbitration agreements has nothing to do with enjoining strikes. The Norris-La Guardia Act was intended to protect picketers, not class plaintiffs, let

alone passive class members. The Board's reliance on that statute is revisionist history.

III. *Chevron* Deference is Unwarranted.

Although this Court ordinarily defers to the Board's interpretation of the NLRA under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), no such deference is warranted here for several reasons.

The Court has held that the Board is entitled to *Chevron* deference based on its "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Sci., Inc.*, 494 U.S. 775, 786 (1990). It has emphasized that Congress "likely intended an understanding of labor relations to guide the Act's application." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995).

Yet here, the Board is not "developing and applying national labor policy" on class actions. It is not defining a set of procedures that are necessary to vindicate employees' NLRA rights. Rather, it is saying that an employee's right to pursue class actions is whatever a court says it is. This rule is not "national" because it will vary from jurisdiction to jurisdiction. It is also not a "labor policy" in any meaningful sense because it simply imports the rules developed by other regulators without reflecting the exercise of independent judgment.

Nor is the Board applying its "understanding of labor relations." The Board has no expertise on class actions. Class actions are not even permissible before the Board, so the Board has no first-hand knowledge of

how they work in practice. The statutes that are vindicated through class actions, such as the FLSA and employment discrimination statutes, also lie outside the Board's authority and expertise. There is no evidence that the Board was aware of the rich literature arguing that class actions typically are far more lucrative for class counsel than they are for the class. *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 618-19 (2010); John H. Beisner et al., *Class Action 'Cops': Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005). The Board may have a policy preference for class actions, but it has no expertise on the benefits and harms of the class action device. The justifications for deferring to the Board's interpretation of the NLRA are therefore absent.

Finally, this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). Here, the Board's position not only trenches upon the NLRA, but also trenches upon the substantive statutes that do not, by themselves, confer a right to pursue class actions. *Supra*, at 22-23. As such, the Court should not defer to the Board's decision.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed, and the judgments of the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
1700 N. Moore Street
Suite 2250
Arlington, VA 22209

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG 15 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300 & 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,
v.
JACOB LEWIS, *Respondent*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
MURPHY OIL USA, INC., *et al.*, *Respondents*.

ERNST & YOUNG LLP, *et al.*, *Petitioners*,
v.
STEPHEN MORRIS, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF TEN INTERNATIONAL LABOR UNIONS, NATIONAL EMPLOYMENT LAW PROJECT, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

NICOLE G. BERNER,
Gen'l Counsel
CLAIRE PRESTEL,
Assoc. Gen'l Counsel
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 Massachusetts Ave. NW
Washington, DC 20036
(202) 730-7383
nicole.berner@seiu.org
claire.prestel@seiu.org
Counsel for Amicus Curiae SEIU

MICHAEL RUBIN,
Counsel of Record
ERIC P. BROWN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
mrubin@altshulerberzon.com
Counsel for all Amici

[additional counsel listed on inside covers]

Mosaic - (301) 927-3800 - Cheverly, MD

JUDITH RIVLIN
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
1101 17th Street, N.W.,
Suite 900
Washington, D.C. 20036
Telephone: (202) 775-5900
jrivlin@afscme.org
Counsel for Amicus AFSCME

DAVID J. STROM,
General Counsel
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
555 New Jersey Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-4400
dstrom@aft.org
Counsel for Amicus AFT

JODY CALEMINE
COMMUNICATIONS WORKERS OF AMERICA
501 Third Street, N.W.,
Suite 800
Washington, DC 20001
Telephone: (202) 434-1234
jcalemine@cwa-union.org
Counsel for Amicus CWA

MARK SCHNEIDER
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS
9000 Machinists Place
Upper Marlboro, MD 20772
Telephone: (301) 967-4510
mschneider@iamaw.org
Counsel for Amicus IAMAW

BRADLEY T. RAYMOND,
General Counsel
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 624-6800
BRaymond@teamster.org
Counsel for Amicus IBT

ALICE O'BRIEN,
General Counsel
NATIONAL EDUCATION ASSOCIATION
Office of the General Counsel
1201 16th Street, NW
Washington, DC 20036
Telephone: (202) 822-7043
aobrien@nea.org
Counsel for Amicus NEA

MATTHEW C. KOSKI,
Program Director
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway Ste 402
Oakland, CA 94612
mkoski@nelahq.org
Counsel for Amicus NELA

CATHERINE K. RUCKELSHAUS
General Counsel and
Program Director
NATIONAL EMPLOYMENT LAW PROJECT
75 Maiden Lane, Suite 601
New York, NY 10038
Telephone: (646) 693-8221
cruckelshaus@nelp.org
Counsel for Amicus NELP

[additional counsel listed on inside back cover]

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STATEMENT OF INTEREST

Amici American Federation of Teachers; American Federation of State, County and Municipal Employees; Communications Workers of America; International Association of Machinists; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; National Education Association; Service Employees International Union; United Food and Commercial Workers International Union; and United Steelworkers International Union are international labor unions with a combined membership of approximately 13.5 million working men and women throughout the United States and Canada.

Amicus National Employment Lawyers Association is a non-profit professional membership organization, with 69 affiliates throughout the country, composed of attorneys who represent workers in labor, employment, and civil rights disputes. Amicus National Employment Law Project is a New York-based nationwide nonprofit organization that partners with community-based worker centers and other low-wage worker representatives in all 50 states to advocate for the rights of unorganized workers.

Each of the undersigned amici is dedicated to promoting the rights of working people, with the goal of advancing and safeguarding the full employment, economic security, and social welfare of workers and their families.[1]

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[1] No counsel for a party authored this brief in whole or in part. No party, or its counsel, or any entity other than the

Amici and their counsel have considerable familiarity with "concerted activity" protections under federal and state labor law, from both a practical and historical perspective, and have extensive experience with the history of labor and employment arbitration in the American workplace. Amici and their members also have a strong interest in preserving the core workplace protections established by Congress in the National Labor Relations Act, 29 U.S.C. §§151 et seq. ("NLRA") and Norris-LaGuardia Act, 29 U.S.C. §§101 et seq., and recognize that if employers are allowed to impose contract terms that prohibit workers from challenging unlawful employer conduct except on an individual, one-on-one basis, Congress's statutory goals of minimizing industrial strife and maintaining labor peace will be set back more than a century.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold issue in these consolidated cases is whether federal labor law, specifically, the NLRA and Norris-LaGuardia, make it unlawful for an employer to prohibit its employees from filing legal claims on a joint, class, collective or other group action basis to seek a peaceful, impartial resolution of a legal dispute arising from commonly held workplace rights.

The arbitration contracts in these cases prohibit *every* potential form of non-individual, group legal

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undersigned amici and their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of amicus briefs. *See* Rules 37.6, 37.3(a).

action, not just Rule 23(b)(3) damages class actions. Although the Employers and their amici repeatedly refer to their prohibitions as "class action waivers," their contracts prohibit all manner and form of joint or group legal challenges, whether brought by two or more workers, by a single worker soliciting the joinder of others, or otherwise. Epic Systems' contract goes even further, depriving arbitrators of authority to award any form of non-individual relief, such as an injunction against unlawful company-wide practices. *See* Epic Pet. 31a-32a.

If the Employers had imposed these prohibitions in any manner other than through an arbitration agreement—*e.g.*, an individual employment contract, a hiring term letter, or a posted workplace policy—those prohibitions would be unlawful under the NLRA and unenforceable under Norris-LaGuardia because they would deprive workers of their core statutory right to be free from employer interference, restraint, and coercion when engaged in concerted activity for mutual aid or protection. *See, e.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940); *Convergys Corp.*, 363 NLRB No. 51 (2015), *enf. denied by divided panel*, __ F.3d __, 2017 WL 3381432 (5th Cir. Aug. 7, 2017). The Employers nonetheless contend that because they chose to embed their prohibitions against concerted legal action in pre-dispute arbitration contracts, the Federal Arbitration Act of 1925 ("FAA"), 9 U.S.C. §§1 et seq., trumps the later-enacted Norris-LaGuardia and the NLRA and requires the enforcement of those prospective prohibitions.

That cannot be. Whatever principles may apply in the consumer context, Congress recognized that em-

ployment is different when it enacted Norris-LaGuardia in 1932 and the NLRA in 1935. Because of the economic and psychological importance of having and keeping a job and the enormous disparity in economic power between individual workers and their employers, Congress established as the foundational, non-waivable cornerstone of national labor policy the right of employees to act in concert for mutual aid or protection.

The enforceability of an illegal employment contract term under the NLRA and Norris-LaGuardia cannot turn on whether it is inserted into an arbitration contract rather than some other employment agreement. If illegal restrictions on concerted activity could be immunized by the simple expedient of embedding them in an arbitration contract, employers could immunize prospective waivers of their employees' statutory right to picket, strike, or boycott simply by requiring arbitration of all workplace disputes, on an individual basis, while forbidding all traditional forms of group protest. Nothing in federal labor law permits that distinction. Employers should have no greater authority to compel their workers to waive the right to pursue group legal action challenging unlawful workplace conditions than to compel waiver of the right to picket, strike, or boycott over those same conditions. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit this [concerted activity] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *Salt River Valley Water Users Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953), *enf'g* 99 NLRB 849, 853 (1952) (employee's circulation of peti-

tion to obtain authorization to pursue FLSA claims constitutes protected concerted activity).

Nothing in the language or legislative history of the FAA requires a different result. The Employers and their amici, in asserting that an employer's prohibition of all non-individual workplace claims filing becomes lawful if inserted in a pre-dispute employment arbitration contract, principally rely on a construction of FAA §2 that they attribute to *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). But this Court has never required enforcement of an otherwise unenforceable contractual waiver of statutory rights simply because it was inserted in a mandatory pre-dispute employment arbitration agreement rather than a separate contract, and FAA §2 makes plain that the same rules of statutory construction must apply regardless of what type of contract incorporates the allegedly unlawful provision.

Countless examples could be provided of facially unlawful clauses in arbitration agreements that courts would not hesitate to invalidate, where the underlying statute does *not* expressly refer to the FAA or to arbitration as the Employers' test would require. E&Y Br. 22-24. For example, Title VII would surely preclude enforcement of a clause that required gender discrimination claims to be heard by male decisionmakers or that limited the number of depositions available to Hispanic employees. The Age Discrimination in Employment Act would similarly prohibit a clause limiting backpay remedies for workers over age 60. Yet under the Employers' construction of the FAA and *CompuCredit*, judicial enforcement of those discriminatory provisions would

be required because Title VII, the ADEA, and most other worker-protection statutes do not expressly refer to "arbitration" or the "FAA."

Statutes must be construed in light of their historical context and as the enacting Congress intended. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (the ordinary and common meaning of statutory language is the meaning of those terms "at the time Congress enacted the statute"); *MCI Telecommunications v. Amer. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("the most relevant time for determining a statutory term's meaning" is when the statute "became law"). Congress's contemporaneous understanding of the interplay among the FAA, Norris-LaGuardia, and NLRA must be informed not only by the language of all three statutes (including Section 15 of Norris-LaGuardia, 29 U.S.C. §115, which states that the Act supersedes any statutory provision that conflicts with the national labor policy it establishes) but also by the narrow reach of Congress's Commerce Clause authority when it enacted the FAA in 1925, *see infra* at 32-33, and by Congress's recognition, before and after enactment of the FAA, that workplace-wide arbitration was a common and effective mechanism for resolving labor disputes and achieving industrial peace, *see infra* at 28-30.

Amici, who write on behalf of tens of millions of American workers and their representatives, urge this Court to conclude that the Board and the Seventh and Ninth Circuits (and, most recently, the Sixth Circuit in *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017)), were correct in holding that a workplace policy that strips employees of their

right to pursue legal challenges to workplace conditions in concert—i.e., on any joint or other group basis that the workers would otherwise be permitted to pursue—is void and unenforceable under federal labor law, whether set forth in an individual employment arbitration agreement or in any other employment contract. That result is required by the plain language of the FAA, NLRA, and Norris-LaGuardia, the contemporaneous intent of Congress, and the long and rich history of "concerted activity" and workplace arbitration in the United States. *See also Convergys Corp.*, 2017 WL 3381432 at *6-*11 (Higginbotham, J., dissenting).

ARGUMENT

I. The Right of Employees to Engage in Concerted Activity for the Purpose of Mutual Aid or Protection is the Core Substantive Right Protected by Federal Labor Law

For the past 85 years, federal labor law has prohibited employers from enforcing individual employment contract terms that prohibit employees from peacefully acting in concert to vindicate workplace rights. The right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" has long been the core substantive right protected by Norris-LaGuardia and the NLRA, and the Board and the federal appellate courts have consistently held that it encompasses concerted efforts to seek adjudication of claims challenging the legality of an employer's workplace policies and practices. *See* NLRB Br. at 11-21; Lewis Br. 10-17. Without the ability to

act in concert, only the most specialized and sought-after workers would be able to bargain over the terms and conditions of their employment or advocate for greater workplace rights.

In amici's experience, confirmed by decades of case law, few workers are willing to put a target on their back by bringing legal claims against their employer on an individual basis, given the threat of workplace retaliation, blackballing, and other, "more subtle forms" of employer disapproval, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); and that is true even among the small proportion of workers who might otherwise have the financial means and legal knowledge required to pursue such claims.[2]

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[2] *See Crawford v. Metro. Gov't*, 555 U.S. 271, 279 (2009) (chilling effect of potential retaliation "is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias or discrimination' ") (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20, 38 & n.58 (2005)); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("broad protection from retaliation helps ensure the cooperation upon which accomplishment of [Title VII's] primary objective depends"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); *D.R. Horton*, 2012 WL 36274, at *3 n.5; David Weill & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Policy J. 59, 83 (Fall 2005) (citing studies showing that "being fired is widely perceived to be a consequence of exercising certain workplace rights"); Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 Indiana L.J. 101, 120-23 (1995) (fear of employer retaliation is key reason for workers not reporting

A. Congress Enacted Norris-LaGuardia and the NLRA to Reduce Industrial Strife Resulting from Court Injunctions that Enforced One-Sided Employment Contracts Imposed on Individual Workers

Congress first codified the right to engage in "concerted activities for the purpose of . . . mutual aid or protection" as the fundamental principle of national labor policy in 1932 in Norris-LaGuardia, where it declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives or in self-organization or *in other concerted activities for the purpose of* collective bargaining or *other mutual aid or protection*." 29 U.S.C. §102 (emphasis added). In sweeping language (enacted seven years *after* the FAA) Congress then flatly declared:

> *Any* undertaking or promise . . . in conflict with [that policy is] contrary to the public policy of the United States [and] *shall not be enforceable in any court of the United States* . . . .

Id. §103 (emphasis added). Congress's withdrawal of the federal courts' authority to enforce contracts

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wrongdoing); Milliken, Morrison & Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, NYU School of Business (Nov. 4, 2003), *available at* http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf (discussing study on employee fear of retaliation or punishment, and employee fear of being labeled or viewed negatively by employer, as reasons for employees not acting on concerns about company policies or decisions).

that stripped workers of the right to act in concert for mutual aid or protection was a core provision of Norris-LaGuardia; and that Act's broad statement of national policy and purpose was crucial to the Board's statutory analysis in *D.R. Horton*, 357 NLRB 2277, 2012 WL 36274, at *7-*8 (2012), and subsequent decisions. *See, e.g., On Assignment Staffing Servs., Inc.* 362 NLRB No. 189, 2015 WL 5113231, at *10 (2015) (describing purpose and scope of Norris-LaGuardia's protections). Yet the Employers and their amici ignore Norris-LaGuardia almost entirely.

Congress enacted Norris-LaGuardia to strengthen the concerted-activity protections it had enacted in Sections 6 and 20 of the Clayton Act of 1914, 15 U.S.C. §17; 29 U.S.C. §52, which had proven inadequate to protect workers from having their collective protests and bargaining efforts enjoined as unlawful labor conspiracies by state and federal courts. *See City Disposal Systems*, 465 U.S. at 835; *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 715-16 (1982); Felix Frankfurter & Nathan Greene, The Labor Injunction 7-10, 49-50 & n.7, 136-50, 165-76 (MacMillan 1930) ("Frankfurter"); William E. Forbath, Law and the Shaping of the American Labor Movement 115-16 & n.65, 147-63 (Harvard Univ. Press 1989) ("Forbath"); *see also* N.E. Legal Found. Amicus Br. at 20-21 & n.10. As these authorities and contemporaneous accounts demonstrate, Congress in Norris-LaGuardia sought to create a federally guaranteed right to engage in concerted activity that would prevent future judicial enforcement of one-sided employer-mandated contracts that prohibited employees from joining independent unions, jointly pursuing workplace griev-

ances, or engaging in other concerted actions to improve workplace conditions.

Congress's purpose was not just to protect the right of workers to organize and collectively bargain, although those were important objectives. More broadly, based on its recognition that individual workers cannot meaningfully negotiate over employer-mandated contract terms and that judicial enforcement of rights-stripping contracts was causing disruptive social discord, Congress sought to strengthen the ability of American workers—non-union and union alike—to act collectively to improve their workplace conditions through non-violent means. *See* 29 U.S.C §102; Frankfurter at 204-05, 210-12; Forbath at 59-97; Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris La-Guardia Act*, 93 Neb. L. Rev. 6, 10-12, 16 (2014). As Norris-LaGuardia's co-sponsor Senator George Norris explained, Norris-LaGuardia was necessary to end a regime in which "the laboring man must accept unconditionally the terms laid down by the employer" and must "singly present any grievance he has . . . [with] no opportunity to join with his fellows and make his demands effective." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris); *see also Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 n.14 (1978) (Norris-LaGuardia "expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, *and the welfare of labor generally*' ") (quoting S. Rep. No. 72-163 (1932)) (emphasis in *Eastex*).

Just three years after enacting Norris-LaGuardia, Congress reiterated those central principles of fed-

eral labor policy in the NLRA, which created the National Labor Relations Board and authorized it to enforce that same right to engage in concerted activity for mutual aid or protection against employer interference, restraint, or coercion. Section 7 of the NLRA mirrored Section 2 of Norris-LaGuardia by again guaranteeing employees the "right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §157. The NLRA also established an administrative mechanism for enforcing that right, providing that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* §158(a)(1); *see also id.* §151 (declaration of policy); *Murphy Oil* Pet. 2, 10, 16 (describing statutory basis and history of right to engage in concerted activity).

Like Norris-LaGuardia, the NLRA was enacted to counter the disparity in power that left individual employees unable to meaningfully improve the terms and conditions of their employment, *see Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-54 (1985), a disparity that Congress had also recognized in prior statutory enactments, *including* the FAA. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the [Federal] Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1."). The legislative history of the FAA reflects that recognition. As explained by Senator Walsh, for example, in comparing insurance and employment contracts to the types of

commercial contracts that were the focus of the FAA's drafters:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923).

B. Congress Did Not Create Two Separate Tiers of Concerted Activity Protection in Either Norris-LaGuardia or the NLRA

The Employers and some of their amici now suggest (for the first time) that Congress intended to create two tiers of concerted activity in its 1930's legislation: a core protection for union organizing and collective bargaining, and a lesser protection (or according to some, no protection at all) for all other concerted activity for mutual aid or protection. That construction is not supported by the language or purpose of Norris-LaGuardia (which broadly prohibits the enforcement of *any* undertaking or promise that conflicts with employees' right to pursue concerted activities for the purpose of mutual aid or protection, 29 U.S.C. §103), or the NLRA (which, like Norris-La-

Guardia, expressly expanded upon the concerted-action protections of prior statutes, including the Railway Labor Act of 1926, *see* Hobson Br. 20-21, 26). Nor is the Employers' construction supported by *ejusdem generis*, a canon whose malleability is highlighted by the Employers' and their amici's inability to agree even among themselves as to what the activities described in Section 7 have in common.[3]

The reason Congress guaranteed the broad right to engage in "other concerted activities for the purpose of . . . other mutual aid or protection" was not because it believed that "other" concerted activities were less important than collective bargaining or union organizing. Almost all concerted workplace activity has the potential to increase workers' collective power and cohesiveness going forward—even in organized workplaces that already have bargaining agreements in place. *See, e.g., NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980) (sympathy strike supporting unorganized workers); *NLRB v. Difco Lab., Inc.*, 427 F.2d 170 (6th Cir. 1970) (sympathy strike supporting different union); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (L. Hand, J.) (published statement of support for farmers' cooperative).

Nor could Congress reasonably have concluded that its goal of reducing industrial strife would be

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[3] *Compare* U.S. Amicus Br. 27 ("substantive workplace-related rights closely akin to self-organization or collective bargaining") *with* Epic Br. 34 ("things that employees can engage in either on their own or with the involvement of no one other than their employers") *and* E&Y Br. 17 ("concerted activities such as the enumerated activities").

more directly or effectively furthered by union organizing and collective bargaining than by other forms of concerted activity. When an employer engages in wrongful discrimination or violates other workplace statutory obligations, it is far less disruptive to allow the injured workers to pursue concerted legal action before a neutral decisionmaker than to force the workers to challenge that unlawful conduct through less effective and potentially more contentious form of group protest, such as strikes, that pit workers and employers directly against each other without the intermediary of a neutral pledged to apply the law fairly and impartially.

Rather, Congress had two reasons for referring generally to "other" concerted activities in 1932 and 1935: first, to ensure that "mutual aid or protection" would encompass indirect no less than direct efforts to obtain workplace improvements, *see* Frankfurter at 26-27 ("When the objectives of concerted action are higher wages, shorter hours and improved working conditions, . . . the benefit to workers is direct and obvious, and the right to combine for such purposes is universally recognized."); and second, because Congress knew it could not anticipate the many ways in which workers seeking to improve their economic circumstances might join in common endeavor to advocate for workplace improvements. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978). As the Board has held: "The language of Section 7 is general and broad; there is no indication in the statutory text, in the legislative history, or in the Supreme Court's

decisions that the 1935 Congress intended to fix, for all time, the ways in which employees would be able to engage in protected efforts to improve their working conditions." *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 at *19 (2014); *see also* S. Rep. No. 74-573 (1935) ("It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship.").

Moreover, by joining together and sharing the burdens of concerted adjudication, workers pursuing joint legal claims are acting in a manner that Congress *expressly* protected in Section 4 of Norris-LaGuardia. 29 U.S.C. §104(d). That provision guarantees employees the right "[b]y all lawful means [to] aid . . . any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or of any State." *Id.* Section 4 also protects "[g]iving publicity to the existence of, or the facts involved in, any labor dispute . . . by any . . . method not involving fraud or violence"—which encompasses soliciting joinders, sending notice, and otherwise banding together for the purpose of pursuing legal claims against an employer. 29 U.S.C. §104(e).

No court or administrative body in the past 85 years has demoted "other" concerted activity to lesser status, as the Employers urge. Nor would that construction make sense, as Congress's goal was not to further union organizing or collective bargaining for their own sake, but as instruments to further the broader statutory goal of reducing industrial strife and achieving economic stability by empowering workers to join together to improve the terms and

conditions of employment. *See, e.g., Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace."); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938). Indeed, Senator Wagner introduced the bill by explaining that it was intended to address the "sharp outbreaks of economic warfare in various parts of the country . . . ," 78 Cong. Rec. 4229, 4230 (1934), and the Senate Report reiterates that "[t]he first objective of the bill is to promote industrial peace." S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935).

Consistent with these legislative objectives, dozens of federal appellate decisions, from the late 1930s to the present, have held that Section 7 protects a broad range of joint worker efforts, including many forms of concerted activity that bear only an indirect relationship to union organizing or collective bargaining.[4]

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[4] *See, e.g., Houston Insulation Contractors Assoc. v. NLRB*, 386 U.S. 664, 668-69 (1967) (refusal to work); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223-24 (1963) (striking in support of bargaining demands); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 13-14 (1962) (walking out of work); *NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82 (2d Cir. 1987) (testifying on behalf of fellow employee in criminal trial concerning alleged strike misconduct); *Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662 (2d Cir. 1966) (writing letter to government agency concerning employer's failure to comply with safety statute); *Wulls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 923 (1963) (writing letters to state health department complaining of unsanitary conditions in factory); *NLRB v. Guernsey-Muskingum Elec. Co-op, Inc.*, 285 F.2d 8 (6th Cir. 1960) (concerted complaints to management concerning ap-

C. The Employees in these Cases Were Engaged in Concerted Activity for Mutual Aid or Protection

In each of these three cases, the workers whose rights are at issue were engaged in concerted activity for mutual aid or protection. In *Murphy Oil*, four workers joined to file a multi-claimant action for unpaid wages and benefits. In *E&Y* and *Epic*, the original plaintiffs joined their claims with others and reached out to co-workers with identical wage claims, who then retained the same counsel and filed consent-to-sue joinders under 29 U.S.C. §216(b), thereby becoming co-plaintiffs. In all three cases, those workers stated their intent to seek class and/or collective action certification, thereby promising to "fairly and adequately protect the interests of the class" if certification were granted, *see* Fed. R. Civ. Pro. 23(a)(4), and asking for permission to send written notice to all similarly situated co-workers

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pointment of allegedly unqualified foreperson); *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948) (letter to management about filling open position that would impact letter-writers' work, "even though no union activity be involved or collective bargaining be contemplated."); *Peter Cailler Kohler*, 130 F.2d 503 (resolution supporting farmers' cooperative in dispute with employer's customer); *Bethlehem Shipbuilding Corp. Ltd. v. NLRB*, 114 F.2d 930, 937 (1st Cir. 1940), *cert. dismissed*, 312 U.S. 710 (1941) (employees' public support for state workers compensation bill protected under Section 7, which "is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection,' including appearance of employee representatives before legislative committees"); *see also D.R. Horton*, 2012 WL 36274, at *2-*3 (citing cases).

under Rule 23(c)(2)(B) and *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), to inform co-workers of their statutory rights and their opportunity to participate in the group effort to remedy their employers' allegedly unlawful workplace practices. The workers also acted precisely as Congress authorized them to act, not only in Norris-LaGuardia and the NLRA, but also in the FLSA, which since 1938 has expressly allowed covered claims to "be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. §216(b), thus further recognizing the protections given to concerted actions in the workplace.[5]

By joining together in filing their legal claims, and by taking steps to encourage others to join as well, plaintiffs sought to spread the risks and burdens of litigation, gain strength and protection in numbers, and share information and resources, thereby reducing the risk of retaliation and increasing the likelihood of a favorable resolution of their workplace disputes, all of which is activity for the purpose of mutual aid or protection. *See Meyers Industries, Inc.*, 281 NLRB 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) ("definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action"); *Int'l Transp. Serv. Inc.*

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[5] This same statutory provision is incorporated into the Age Discrimination in Employment Act, 29 U.S.C. §626(b); the Equal Pay Act, 29 U.S.C. §216(b); and the Family Medical Leave Act, 29 U.S.C. §2617(a)(2).

v. NLRB, 449 F.3d 160, 166 (D.C. Cir. 2006) ("[C]oncerted activity includes circumstances where individual employees work to initiate, induce or prepare for group action.") (quotation marks and citation omitted).

E&Y contends that Rule 23(b)(3) class actions are not *necessarily* concerted, because a class action potentially could be filed by a single plaintiff who has never communicated with any co-worker and who (despite the requirements of Rule 11) has no intention of seeking class certification. No one contends that this happened in any of these cases. Nor have the Employers cited a single court or Board decision in which an individual who filed or joined a class action was held *not* to be engaged in concerted activity for the mutual aid or protection of similarly situated co-workers.

Proceeding on a group action basis is the most efficient, least costly, and least retaliation-risking mechanism available for challenging the legality and enforceability of employer policies and practices that affect groups of similarly situated workers. In amici's experience, the collective benefits achievable through such concerted legal actions are precisely why workplace claims challenging the common application of such policies and practices are so often pursued as joint and class actions in the first place.

While several Employer-side amici cite decade-old surveys and reports for the dubious proposition that workers *benefit* from and *prefer* arbitration to litigation (an assertion that is not only counterfactual but contrary to common sense, because if arbitration were as good for workers as those amici insist, no

employer would need to impose mandatory pre-dispute arbitration as a condition of employment), the reality is that even before employers began including express class action "waivers" in their mandatory employment agreements, *see* Business Roundtable Br. 2-3 (describing such prohibitions as "de rigeur" since at least 2010), the number of workers filing workplace claims in arbitration dropped substantially while the amount of those workers' recoveries has remained comparatively low.[6]

None of the Employers or their amici identify any benefit to workers from being denied the right to choose whether to pursue workplace claims collectively or individually. Nor could they, because if employers are given the right to prohibit all forms of legal challenge other than individual arbitration, many workers, particularly non-unionized low-wage workers, would have no ability to protect—or in

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[6] *See, e.g.*, Cynthia Estlund, "The Black Hole of Mandatory Arbitration," 96 N.C. L. Rev. __ (forthcoming 2018) (citing recent empirical studies and analyzing structural causes); Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2813-14 (2015) ("Resnick"); J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015) ("Glover"); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brooklyn L. Rev. 1309 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Studies 1, 6 (2011).

many cases, even to obtain notice of—their workplace rights, leaving employers effectively immune from legal challenge—which is the obvious reason why employers insert clauses into their arbitration contracts that strip workers of their right to pursue legal claims in conjunction with co-workers. *See* Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 Hastings L.J. 881 (2016); Resnick at 2879; Glover at 3066; Cynthia Eastlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 428-29 (2006).

D. The Employers' Contractual Bar on Concerted Legal Activity Violates Norris-LaGuardia and the NLRA

Section 8(a)(1) of the NLRA prohibits any effort by an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," as does Section 2 of Norris-LaGuardia; and Section 3 of Norris-LaGuardia further prohibits judicial enforcement of "[a]ny undertaking or promise" that interferes with that right. For these reasons, "[i]t is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void," *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339, at *3 & n.6 (2015), as many cases from this Court, the federal appellate courts, and the Board have held.[7]

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[7] *See, e.g.*, *J.I. Case v. NLRB*, 321 U.S. 332, 337, 341-42 (1944) ("Individual contracts no matter what the circumstances that

The Employers and their amici try to distinguish those cases factually. But their strained efforts must be rejected for the reasons set forth in the Board's and the party-Employees' briefs.

Under the NLRA and Norris-LaGuardia, an individual employment contract that requires a worker prospectively to forfeit the right to engage in protected concerted activity is invalid—whether it be an agreement not to join a union, not to join with co-workers in pursuing a legal challenge to the legality of their employer's workplace practices, or not to engage in any other concerted activities. The Board and the courts have so held countless times, in a wide range of circumstances, as required by the plain statutory language of the NLRA and Norris-LaGuardia.[8] For all

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justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act . . . ."); *National Licorice Co.*, 309 U.S. at 360-61 (affirming Board ruling that individual employment contract violates Section 8(a)(1) because it discouraged employees from presenting grievance to employer except on an individual basis: "contracts . . . stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]" are "a continuing means of thwarting the policy of the Act."); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (individual employment contract language requiring employees first to attempt to resolve employment disputes individually with employer is a per se violation of the Act because it was a "restraint upon collective action," even if "entered into without coercion"); *John & Ollier Engraving Co.*, 24 NLRB 893, 900-01, 906-07 (1940), *enf'd in relevant part*, 123 F.2d 589, 593 (9th Cir. 1941) ("profit-sharing" contract offered to employees that purported to waive right to strike violated Section 8(a)(1)).

[8] *See, e.g., Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988) (conditioning reinstatement on

of these reasons, the Court should conclude as a threshold matter that the NLRA and Norris-LaGuardia prohibit employers from interfering with their employees' statutory right to join together in seeking to vindicate workplace rights through concerted legal activity.

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waiver of Section 7 rights violates Section 8(a)(1)); *Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (even where employer has right to deny re-employment, unlawful to condition reinstatement on waiver of Section 7 rights); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (Section 8(a)(1) violated by employer conditioning return to employment on waiver of Section 7 rights); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001) ("[A]n employer may not coercively condition an individual's return to employment on . . . forbearance from future charges and concerted activity because future rights of employees as well as the rights of the public may not be traded away in this manner.") (quotation marks and citation omitted); *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936), *enf. as mod. on other grnds*, 94 F.2d 138 (1937), *cert. denied*, 304 U.S. 575 (1938); *Contractor Services, Inc.*, 324 NLRB 1254, 1254-55 (1997); *A&D Davenport Transp., Inc.*, 256 NLRB 463, 466-67 (1981); *Columbia Univ.*, 236 NLRB 793, 795-96 (1978); *John C. Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973); *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001); *see also Convergys*, 2017 WL 3381432 at *10 (Higginbotham, J., dissenting) ("[J]ust as an employer cannot require employees to waive their right to bargain collectively by characterizing bargaining as procedural, an employer cannot require employees to waive their right to class and collective actions."); *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454, at *18 (2014) (a rule prohibiting concerted adjudicative activity "may be unlawful even if there is no showing that a covered employee ever engaged in the protected concerted activity prohibited by the rule, precisely because the rule itself discourages employees from doing so.").

II. There is No Conflict between the Federal Arbitration Act and the Federal Labor Law Right to Engage in Concerted Legal Activity

The ultimate question in these cases is whether the Employers' otherwise unenforceable prohibitions against group legal activity must be judicially enforced, solely because those prohibitions were set forth in mandatory pre-dispute arbitration agreements rather than in a stand-alone employment contract. The answer must be no, because employees have a substantive right to act in concert when initiating legal challenges to their employer's workplace policies,[9] and because the FAA's savings clause, 9 U.S.C. §2, makes arbitration agreements "as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). After all, the FAA is merely a procedural statute, enacted to establish a mechanism for judicial enforcement of "provision[s] in a written contract to settle [covered disputes] by arbitration," 9 U.S.C. §2, and was intended neither to create substantive rights nor to deprive the parties to an arbitration contract of existing statutory rights.[10]

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[9] *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (distinguishing between explicit statutory guarantees, which are substantive, and the mechanisms for enforcing them, which are procedural).

[10] As this Court held in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924) (Brandeis, J.), in upholding the constitutionality of the New York Arbitration Act of 1920 (which was the model for the FAA, *see Hall St. Assocs., L.L. C. v. Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008)), the New York law

A. Giving Effect to Norris-LaGuardia and the NLRA Would Not Interfere with any Fundamental Attributes of Arbitration

The Employers argue that under *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), an otherwise unlawful term in an arbitration contract must be enforced if striking it would interfere with a "fundamental attribute" of arbitration, such as speed, efficiency, low cost, or informality. That argument fails for the reasons explained by the Board and the Party-Employees, and because: (1) Supremacy Clause

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simply established a procedure for enforcing voluntary arbitration contracts and was not intended to affect any substantive legal rights or remedies. 264 U.S. at 124 ("This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.").

In the FAA's legislative history, Congress cited *Red Cross Line* in explaining the similarly limited intended scope of the FAA, *see* S. Rep. No. 68-536, at 3 (1924), and also cited (as setting forth the "principles" that Section 2 "follows") "the leading case of *Matter of Berkovitz* (230 N.Y. 261)." *See Hearing on S. 4213 and S. 4212 Before a Subcommittee of the Committee on the Judiciary United States Senate*, 67th Cong., 4th Sess., at 2, 18-22 (1923); *Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary Congress of the United States*, 68th Cong., 1st Sess., at 33-41 (1924). In *Matter of Berkovitz*, the Court of Appeals of New York emphasized that "[a]rbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." 230 N.Y. at 270 (Cardozo, J.) (quoted in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-87 (1995).

analysis does not apply where the conflict is between two sets of federal statutes rather than a federal statute and state law; and (2) in the context of workplace disputes, multi-claimant arbitration has always been the rule rather than the exception, since well before the enactment of the FAA.

1. *Concepcion* involved state law "obstacle" preemption under *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), not a potential conflict between two sets of federal statutes. While inquiry into the fundamental attributes of arbitration might be appropriate under obstacle-preemption analysis (which asks whether, in the absence of an express conflict or express preemption, enforcement of state law would cause *any* interference with the broader goals and purposes of federal law), that inquiry has limited bearing on whether an irremediable conflict exists between two (or more) federal statutes.

When federal statutes potentially conflict, courts must attempt to reconcile them. In these cases, reconciliation can be accomplished by allowing employers to require arbitration of individual claims if they choose, as long as they provide an equivalent forum in which to pursue group legal claims (whether it be arbitration or litigation), thus giving effect to FAA §2 and the core, substantive nature of Section 7 rights. All FAA §2 requires is that arbitration contracts be treated no worse, or better, than any other contract.

2. By invalidating unlawful contractual prohibitions of group legal claims filing, the Board and the Sixth, Seventh and Ninth Circuits did not interfere with any fundamental attribute of *employment* arbitration. Joint, consolidated, and other multi-claim-

ant claims filings have long been common in labor and employment arbitrations, which historically involved disputes affecting entire workplaces and have *never* been limited to claims between a single individual and his employer.

When Congress enacted the FAA in 1925, labor arbitration was already an established mechanism for peacefully resolving workplace disputes affecting entire bargaining units, workplaces, and industries. Although Congress exempted workplace arbitration from the coverage of the FAA under Section 1 of that Act, 9 U.S.C. §1, it knew that labor arbitrators commonly adjudicated the rights of multiple workers in a single proceeding; indeed, Congress on several occasions itself required labor arbitration by statute. As this Court recognized in *Circuit City*:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. §651 (repealed).

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001); *see also* D. Nolan, R. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 375 (1983) ("Nolan").

Five years before enacting the FAA, for example, Congress enacted the Transportation Act of 1920, Pub. L. 66-152, 41 Stat. 456 (1920). The Transportation Act provided that workplace disputes in the railroad industry may be referred to Boards of Labor Adjustment established by agreement of the parties, and if this Board were unable to resolve the dispute, to a standing Railroad Labor Board, *Id.* §§302-04, 307, before which the parties had the right to a hearing and to counsel. *Id.* §§309-10. The Railroad Labor Board heard almost 14,000 cases in its five-year existence, Nolan at 385-86, and was but one of several such industry-wide statutory dispute resolution mechanisms. *See* Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926), as amended 45 U.S.C. §§151 et seq.; Newlands Act of 1913, ch. 6, §§1-8, 38 Stat. 103-08 (1913) (providing for arbitration of disputes concerning "wages, hours of labor, or conditions of employment . . . between an employer or employers and employees"); Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888); Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898).

During World War I, the nation experienced large-scale adjudication of labor disputes by the National War Labor Board ("NWLB"). The "result of voluntary agreement of leading representatives of the three great parties in interest—employers (capital), organized labor, and the public," the NWLB was established by Presidential proclamation. Richard B. Gregg, *The National War Labor Board*, 33 Harv. L. Rev. 39, 39-40 (1919). "The board was the court of last resort in all labor disputes for the entire country." *Id.* at 45. Although mediation and conciliation were the primary goals, "the pressure of circum-

stances was such that almost from the start the board acted in a number of cases as a court of arbitration." *Id.* at 44; Nolan, at 404-06 (discussing arbitration by NWLB).

As these examples demonstrate, multi-claimant arbitration affecting workplace-wide terms and conditions of employment was fully consistent with the fundamental attributes of *labor* arbitration as understood by Congress in 1925. That understanding has not changed over time, as shown by the labor arbitration cases decided by this Court that involved multiple workers (under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, the FAA, or both). *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (age discrimination claims jointly brought by three employees); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986) (grievance challenging layoff of 79 workers); *Nolde Bros. v. Bakery Workers*, 430 U.S. 243 (1977) (grievance seeking severance pay for all employees of closing bakery); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 575 (1960) (grievance filed by "[a] number of employees" challenging contracting out bargaining unit work); *United Steelworkers v. Enterprise Wheel Car Corp.*, 363 U.S. 593, 595 (1960) (grievance challenging discharge of "[a] group of employees"); *Goodall-Sanford, Inc. v. United Textile Workers of Am., A.F.L. Local 1802*, 353 U.S. 550 (1957) (grievance challenging denial of benefits to approximately 1,400 laid-off workers). By requiring workers to pursue arbitration individually *or not at all*, the employers are *not* bringing arbitration back to its roots; they are imposing an artificial, entirely one-sided restraint on relatively powerless employ-

ees in direct contravention of eight decades of established national labor policy.

B. Congress in 1932 and 1935 Had No Reason or Obligation to Make Express Reference to the FAA or Arbitration When Guaranteeing Employees the Right to Engage in Concerted Activity for Mutual Aid or Protection

The Employers ultimately rest their position on the assertion that under cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *CompuCredit*, 565 U.S. at 98, *no* provision in an arbitration contract may be invalidated unless a "clear congressional command" requires such invalidation. *See, e.g.*, E&Y Br. 20-25, 32, 37; Epic Br. 13-18. The Board and the Party-Employees have responded at length to this argument, demonstrating that *Mitsubishi*, *Gilmer*, and *CompuCredit* involved a different issue (whether Congress intended to preclude waiver of a judicial forum for a particular statutory claim), and that the inquiry into congressional "command" is best understood as the typical inquiry into congressional "intent." We offer just two additional points.

First, prior to *Mitsubishi* in 1987, this Court had never suggested that Congress had to express itself with special clarity when it intended to preserve a claimant's right to pursue particular statutory claims in court rather than in mandatory arbitration. Until *CompuCredit* in 2012, moreover, this Court had never required Congress to express that intent other than

through the statutory language, its underlying purposes, or some inconsistency between arbitration and the newly created rights. *See Gilmer*, 500 U.S. at 27-29. Thus, no "clear congressional command" requirement as the Employers construe it existed before 2012; and certainly no heightened showing of congressional intent was required in 1932 and 1935 when Congress enacted Norris-LaGuardia and the NLRA. So, even if the present cases raised the same type of issue as in *CompuCredit*—whether a particular statutory claim was non-arbitrable—any heightened standard that Congress must now satisfy in enacting new legislation was not the standard in the 1930s when Norris-LaGuardia and the NLRA were enacted. Besides, as the examples described *supra* at 5 demonstrate, if the FAA required enforcement of every unlawful term in an arbitration contract except those that violate statutes that expressly refer to the "FAA" or "arbitration," employers could deprive workers of substantive statutory rights protected by Title VII, the ADEA, the ADA, and almost every other worker-protection statute enacted by Congress and the states simply by inserting the otherwise unlawful provision into an arbitration contract.

Second, this Court should not base its analysis on whether Congress in Norris-LaGuardia or the NLRA made "clear" reference to the FAA or to employment arbitration because there would have been no logical reason for Congress to do so, given the historical context. At the time of enactment, the FAA did not apply to contracts of employment of any category of workers whom Congress had Commerce Clause power to regulate. *Circuit City*, 532 U.S. at 138-40 (Souter, J., dissenting); *see Hammer v. Dagenhart*,

247 U.S. 251, 272 (1918). Not until well after the FAA was enacted did this Court construe the Commerce Clause as empowering Congress to regulate employees in industries other than those Congress had expressly excluded from FAA—the state- and foreign-line-crossing "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.

It therefore would have made no sense for Congress in 1932 or 1935 to have included language in Norris-LaGuardia or the NLRA expressly referring to the FAA or to employment arbitration. At the time, there was no reason to believe the FAA even applied to employment contracts; and as shown *supra* at 28-30, labor arbitration affecting large numbers of workers in a single proceeding was commonplace and no one disputed its appropriateness. Even if there were some basis for uncertainty, though, Congress put it to rest through Section 15 of Norris-LaGuardia, which plainly stated that Norris-LaGuardia should take precedence over any portion of any prior act. *See* 29 U.S.C. §115.

CONCLUSION

The right to engage in concerted protected activity is "a bedrock principle of federal labor law and policy" that has repeatedly been invoked by the Board and the courts over the past eight decades. *Bristol Farms*, 2015 WL 7568339, at *3 (Nov. 25, 2015). Just as an employer cannot deprive its workers of that substantive statutory right by insisting that they agree to arbitrate all workplace disputes instead of picketing, bargaining, striking, or engaging in any other

form of legally protected collective protest activity, neither can it opt out of the core, substantive worker-protective right established by Norris-LaGuardia and the NLRA by requiring its workers prospectively to waive their statutory right to improve workplace conditions through collective adjudication.

For the reasons stated, the decision of the Fifth Circuit should be reversed and the decisions of the Seventh and Ninth Circuits should be affirmed.

Respectfully submitted,

NICOLE G. BERNER,
Gen'l Counsel
CLAIRE PRESTEL,
Assoc. Gen'l Counsel
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 Massachusetts Ave. NW
Washington, DC 20036
(202) 730-7383
nicole.berner@seiu.org
claire.prestel@seiu.org
Counsel for Amicus Curiae SEIU

MICHAEL RUBIN,
Counsel of Record
ERIC P. BROWN
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
(415) 421-7151
mrubin@altshulerberzon.com
Counsel for all Amici

JUDITH RIVLIN
AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES
1101 17th Street, N.W.,
Suite 900
Washington, D.C. 20036
Telephone: (202) 775-5900
jrivlin@afscme.org
Counsel for Amicus AFSCME

DAVID J. STROM, General
Counsel
AMERICAN FEDERATION
OF TEACHERS, AFL-CIO
555 New Jersey Ave. N.W.
Washington, DC 20001
Telephone: (202) 879-4400
dstrom@aft.org
Counsel for Amicus AFT

JODY CALEMINE
COMMUNICATIONS WORKERS OF AMERICA
501 Third Street, N.W.,
Suite 800
Washington, DC 20001
Telephone: (202) 434-1234
jcalemine@cwa-union.org
Counsel for Amicus CWA

MARK SCHNEIDER
INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS
9000 Machinists Place
Upper Marlboro, MD 20772
Telephone: (301) 967-4510
mschneider@iamaw.org
Counsel for Amicus IAMAW

BRADLEY T. RAYMOND,
General Counsel
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 624-6800
BRaymond@teamster.org
Counsel for Amicus IBT

ALICE O'BRIEN,
General Counsel
NATIONAL EDUCATION ASSOCIATION
Office of the General Counsel
1201 16th Street, NW
Washington, DC 20036
Telephone: (202) 822-7043
aobrien@nea.org
Counsel for Amicus NEA

MATTHEW C. KOSKI,
Program Director
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
2201 Broadway Ste 402
Oakland, CA 94612
mkoski@nelahq.org
Counsel for Amicus NELA

CATHERINE K. RUCKELSHAUS
General Counsel and
Program Director
NATIONAL EMPLOYMENT LAW PROJECT
75 Maiden Lane, Suite 601
New York, NY 10038
Telephone: (646) 693-8221
cruckelshaus@nelp.org
Counsel for Amicus NELP

NICHOLAS W. CLARK
General Counsel
UFCW INTERNATIONAL UNION
1775 K Street, NW
Washington DC 20006
Telephone: (202) 466-1522
nclark@ufcw.org
Counsel for Amicus UFCW

RICHARD J. BREAN,
General Counsel
UNITED STEELWORKERS INTERNATIONAL UNION
Room 807
60 Boulevard of the Allies
Pittsburgh, PA 15222-1214
Telephone: (412) 562-2549
rbrean@usw.org
Counsel for Amicus USW

NIRAJ R. GANATRA
General Counsel
INTERNATIONAL UNION, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
Telephone: (313) 926-5216
nganatra@uaw.net
Counsel for Amicus UAW

CLIFF PALEFSKY
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
Telephone: (415) 421-9292
Email: CP@mhpsf.com

NICHOLAS W. CLARK
General Counsel
UFCW INTERNATIONAL UNION
1775 K Street, NW
Washington DC 20006
Telephone: (202) 466-1522
nclark@ufcw.org
Counsel for Amicus UFCW

RICHARD J. BREAN,
General Counsel
UNITED STEELWORKERS
INTERNATIONAL UNION
Room 807
60 Boulevard of the Allies
Pittsburgh, PA 15222-1214
Telephone: (412) 562-2549
rbrean@usw.org
Counsel for Amicus USW

NIRAJ R. GANATRA
General Counsel
INTERNATIONAL UNION, UAW
8000 East Jefferson Avenue
Detroit, Michigan 48214
Telephone: (313) 926-5216
nganatra@uaw.net
Counsel for Amicus UAW

CLIFF PALEFSKY
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
Telephone: (415) 421-9292
Email: CP@mhpsf.com

RECORD AND BRIEFS

FILED
JUN 16 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 16-285, 16-300, 16-307

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORP.,
Petitioners,
v.
JACOB LEWIS,
Respondents.

ERNST & YOUNG LLP and ERNST & YOUNG U.S. LLP,
Petitioners,
v.
STEPHEN MORRIS and KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC. *et al.*,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300, AND IN SUPPORT OF RESPONDENT MURPHY OIL USA, INC. IN NO. 16-307

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: June 16, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

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Alan S. Kaplinsky and Mark J. Levin, *CFPB's Proposed Arbitration Rule Benefits Class-Action Lawyers at the Expense of Consumers*, WLF Legal Backgrounder (Oct. 14, 2016) 1

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has appeared frequently before this and other courts to support the right of private parties to enter into binding agreements to arbitrate disputes arising between them, as a quicker and more efficient alternative to civil litigation. *See, e.g., Bloomingdale's. Inc. v. Vitolo*, No. 16-1110 (U.S., cert. petition filed Mar. 9, 2017); DIRECTV, *Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). Also, WLF's publishing arm frequently produces articles and other educational materials related to arbitration. *See, e.g.*, Alan S. Kaplinsky and Mark J. Levin, *CFPB's Proposed Arbitration Rule Benefits Class-Action Lawyers at the Expense of Consumers*, WLF Legal Backgrounder (Oct. 14, 2016).

The Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements strictly according to their terms. These petitions involve several instances of lower courts yet again refusing to follow the FAA's directive requiring arbitration

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

contracts to be enforced as written.

The Seventh and Ninth Circuits, relying on the National Labor Relations Act, declined to enforce representative-action waivers in the parties' arbitration agreements, citing an alleged need to vindicate federal labor-law policy. Their refusal to do so flouts the FAA and this Court's decisions construing that statute.

WLF seeks uniform application of the FAA nationwide to ensure that arbitration achieves its basic purpose: resolving disputes efficiently, predictably, and cost-effectively. The Seventh and Ninth Circuits' decisions thwart this goal. In the absence of federal statutes that clearly express congressional intent to override the policies of the FAA in specified circumstances, WLF opposes efforts by some lower courts to craft their own exceptions to the FAA's goals.

STATEMENT OF THE CASE

These three consolidated petitions all address the enforceability of agreements requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.[2] In Nos. 16-285 ("*Epic Systems*") and 16-300 ("*Ernst & Young*"), the Seventh Circuit and the Ninth Circuit held, respectively, that such agreements are unenforceable

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[2] In each of the three petitions, the substantive claim for which the employer sought individualized arbitration was a claim that the employer had improperly deprived employees of overtime pay, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*

because they violate an employee's right to engage in collective action under Section 7 of the National Labor Relations Act (NLRA). *Epic Systems* Pet. App. 1a-29a; *Ernst & Young* Pet. App. 1a-42a.

In No. 16-307 ("*Murphy Oil*"), the National Labor Relations Board (NLRB) had reached a similar conclusion in connection with its decision in an unfair-labor-practices proceeding. *Murphy Oil* Pet. App. 17a-208a. The Fifth Circuit disagreed with the NLRB. It granted the employer's petition for review in substantial part, holding that the FAA requires enforcement of such arbitration agreements. *Id.* at 1a-16a. It held that Murphy Oil did not commit an unfair labor practice by requiring employees to sign arbitration agreement or seeking to enforce them in subsequent court proceedings. *Id.* at 2a.

The Fifth Circuit also rejected the NLRB's analysis of arbitration agreements in a prior decision, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). *D.R. Horton* concluded that nothing in the NLRA "contains a congressional command to override the FAA," which, it noted, "establishes a 'liberal federal policy favoring arbitration.'" *Id.* at 360 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). The court held that an employer does not engage in an unfair labor practice by maintaining and enforcing an arbitration agreement that requires employment-related claims to be resolved through individual arbitration because: (1) the NLRA does not contain a clear congressional command prohibiting such agreements; and (2) "use of class action procedures ... is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-62. The Fifth Circuit's August

2015 *Murphy Oil* decision re-affirmed *D.R. Horton*. *Murphy Oil* Pet. App. 7a-8a.

In a May 2016 decision, the Seventh Circuit disagreed with the Fifth Circuit's analysis and affirmed denial of a motion to compel arbitration. *Epic Systems* Pet. App. 1a-23a. It concluded that "the phrase 'concerted activities' in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies." *Id.* at 6a. The court viewed collective-litigation rights as an essential aspect of the NLRA because Congress's "purpose" in enacting the NLRA was "to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of his employment" and because "collective, representative, and class legal remedies allow employees to band together and thereby equalize bargaining power." *Ibid.*

The Seventh Circuit discerned no conflict between its interpretation of Section 7 and the FAA's endorsement of arbitration agreements. The court concluded that the FAA's "savings clause"[3] permits the invalidation of any arbitration agreement that is "unlawful" and that the agreement that Epic Systems sought to enforce was unlawful because it "strip[ped] away employees' rights to engage in 'concerted activities,'" in violation of Section 7 of the NLRA. *Id.* at 15a. The court held that the Section 7 collective-action

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[3] The FAA permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

right is a "substantive" right that (unlike a procedural right) is not waivable. *Id.* at 21a (stating that "[a]rbitration agreements that act as a 'prospective waiver of a party's right to pursue statutory remedies'—that is, of a substantive right—are not enforceable") (quoting *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013).

In its August 2016 decision, a divided Ninth Circuit panel agreed with the Seventh Circuit's analysis (and explicitly disagreed with the Fifth Circuit as well as decisions from the Second and Eighth Circuits). *Ernst & Young* Pet. App. 24a n.16. The majority stated:

> Concerted activity—the right of employees to act *together*—is the essential, substantive right established by [Section 7 of] the NLRA, 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their claims in "separate proceedings." Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.

Id. at 3a. The majority stated, "The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims." *Id.* at 14a. It held that the FAA does not require a contrary result because "the FAA recognizes a general contract defense of illegality" and the limitation on "concerted work-related legal claims" is illegal under Section 7. *Ibid.* It deemed the right to pursue such

claims a "substantive right"—that is, one of "the essential operative protections" of the NLRA—and thus one that "cannot be waived in arbitration agreements." *Id.* at 15a.

Judge Ikuta dissented. *Id.* at 25a-42a. She contended that the majority erred by focusing on whether the NLRA confers "substantive rights" and that its decision conflicts with this Court's case law regarding when a federal statute should be deemed to override's the FAA's mandate. *Id.* at 29a. She concluded that this Court's analysis of the issue:

> [H]as focused primarily on a single question: whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims at issue. If the statute does not, the Court's "healthy regard for the federal policy favoring arbitration" leads it to conclude that there is no such contrary command, and the Court reads the purportedly contrary federal statute to allow the enforcement of the agreement to arbitrate.

Id. at 33a-34a (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). She concluded that nothing in the NLRA "creates a substantive right to the availability of class-wide claims that might be contrary to the FAA's mandate." *Id.* at 35a.

SUMMARY OF ARGUMENT

Section 2 of the FAA makes agreement to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In its landmark *Concepcion* decision in 2011, the Court held that the FAA creates a nationwide policy unequivocally favoring enforcement of arbitration agreements. The Court sent a strong message to lower courts: cease your hostility to arbitration agreements; you may not rely on state or federal law to refuse to enforce such agreements save in exceptional circumstances. *Concepcion*, 563 U.S. at 341-51. In particular, the Court concluded that the FAA prevents courts from conditioning approval of a non-judicial forum on the parties' acceptance of class-wide arbitration. *Id.* at 344 (stating that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

The Seventh and Ninth Circuits' refusals to enforce arbitration agreements in the employment context are simply the latest manifestations of judicial hostility to arbitration agreements. Their refusals are inconsistent with the Court's arbitration case law and should be reversed. The Fifth Circuit correctly concluded that federal law permits employees to voluntarily relinquish their rights to pursue class or collective claims in all forums.

The Court's *Italian Colors* decision is on all fours with this case and requires enforcement of the arbitration agreements at issue. *Italian Colors* held

that "courts must rigorously enforce arbitration agreements according to their terms, ... including terms that specify *with whom* the parties choose to arbitrate their disputes, ... and the rules under which arbitration will be conducted." 133 S. Ct. at 2309 (emphasis in original) (citations omitted). The Court added, "That holds true for claims that allege violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Ibid* (quoting *CompuCredit v. Greenwood*, 565 U.S. 95, 98 (2012)). Just as in *Italian Colors*, enforcement is required here because federal law contains no express congressional command that overrides the FAA.

Section 7 of the NLRA, on which the Seventh and Ninth Circuits relied, says nothing to suggest an intent to override the FAA.[4] It protects the right of workers "to engage in other concerted activities for the purpose of ... other mutual aid or protection," but it does not state that the protected "concerted activities" include the right to assert legal claims on a class-wide basis. Even assuming that "concerted activities" include the filing of legal claims (whether before a court or an arbitrator), employees are quite capable of

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[4] Section 7 states, in relevant part:

> Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities.

29 U.S.C. § 157.

filing such claims in concert with one another without resorting to representative actions—whereby one or more employees purport to file suit on behalf of absent class members.

It is particularly unlikely that Congress sought to protect a class-action right when it adopted the NLRA in 1935, given that modern class-action practice did not emerge until the 1966 revision of Fed.R.Civ.P. 23. Moreover, Section 7 has long been understood as protecting employees from retaliation for engaging in protected concerted activities, *not* as ensuring the success of any such activities. Section 7 may well bar an employer from retaliating against an employee who files a putative class action against it. But the statute does not bar the employer from raising defenses against certification of a class, including a defense based on a pre-existing arbitration agreement.

Both the Seventh and Ninth Circuits relied on the FAA's savings clause as a rationale for overcoming the FAA's command that arbitration agreements be enforced. That clause is inapplicable here. It permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." But Section 7 of the NLRA does not articulate a generally applicable rule of contract law that could be applied as a basis for revoking "any contract." Rather, the Seventh and Ninth Circuits interpret Section 7 as permitting the revocation of a small number of contracts entered into between employers and employees. As this Court has repeatedly held, such rules of law—by treating arbitration agreements with particular disfavor—do

not qualify as generally applicable laws of the sort to which the FAA's savings clause applies.

Because the NLRA contains no "congressional command" overriding the FAA, it is largely irrelevant whether the collective-action right allegedly protected by Section 7 should be deemed "substantive" or "procedural." In any event, the Seventh and Ninth Circuits clearly erred in classifying that alleged right as "substantive." The class-action device created by Rule 23 has long been understood by this and other courts as a procedural mechanism that promotes litigation efficiency, by enabling litigants to avoid the time and expense of trying (and deciding) the same claims repeatedly. It is not intended to bestow substantive advantages to one side or the other of a lawsuit.

Indeed, if the opportunity to seek class-wide adjudication *were* deemed a "substantive" right, that would call the legality of Rule 23 into serious question. It is only by virtue of adoption of the modern Rule 23 that, according to the Seventh and Ninth Circuits, the "substantive" protections of Section 7 were expanded to include the right to adjudicate employee-related rights on a class-wide basis. The Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b). Yet, the classification of the opportunity to seek class-wide adjudication as a "substantive" right would accomplish precisely what the Rules Enabling Act forbids: it would utilize Rule 23 to "enlarge" the "substantive right[s]" of employees in pressing legal claims against their employers.

ARGUMENT

I. THE FEDERAL ARBITRATION ACT REQUIRES ENFORCEMENT OF THE ARBITRATION AGREEMENTS AT ISSUE IN THESE PETITIONS

Enacted "in response to widespread judicial hostility to arbitration, the FAA requires courts to "rigorously enforce arbitration agreements according to their terms," including terms "under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2308-09 (citations omitted). Since the FAA's enactment, this hostility has continued to manifest itself through "a great variety of devices and formulas" to avoid enforcing arbitration agreements as written. *Concepcion*, 563 U.S. at 342.

One such device is an inappropriately broad interpretation of the FAA's savings clause, which permits courts to invalidate arbitration provisions on grounds that would apply equally to all contracts. *Id.* at 339-44. Some courts invoke this clause to cloak a hostility to arbitration by declaring that arbitration procedures need not be enforced based on policy concerns for the vindication of a federal statute.

The Seventh and Ninth Circuits employed that device here. They asserted that by invoking the FAA's savings clause as a means of invalidating arbitration agreements whose enforcement would otherwise be mandated by the FAA, they can avoid an alleged conflict between two federal statutes—the FAA and the NLRA. *Epic Systems* Pet. App. 15a; *Ernst & Young* Pet. App. at 14a. Those courts misinterpreted the savings clause and failed to follow this Court's

prescribed method for determining whether, despite the FAA's mandate, federal law prevents enforcement of an arbitration agreement.

A. Class Arbitration, Unless Agreed to by the Parties, Is Inconsistent with the FAA

The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision establishes a "liberal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. Indeed, "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344.

The underlying employee claims in the three petitions are substantially similar; each involves alleged failure to pay overtime wages, in violation of the FLSA. Prior to asserting those claims, each of the employees had entered into an arbitration agreement with his employer. Those agreements each provided that: (1) any employment-related disputes would be resolved by arbitration rather than in a court proceeding; and (2) the arbitration would proceed on an individualized, not a class-wide, basis. When, despite those agreements, the employees filed lawsuits asserting FLSA claims on behalf of themselves and similarly situated employees, the employers moved to compel arbitration.

As each of the appeals courts recognized, this Court has routinely enforced arbitration agreements

when the underlying claim alleges violation of a federal statute. More than 25 years ago, in the context of a suit for violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, this Court stated:

> It is by now clear that statutory claims may be subject to an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years, we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77/(2). ... In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

In light of *Gilmer*, there is no plausible argument that the arbitration agreements at issue here are unenforceable insofar as they require that the FLSA claims be heard by an arbitrator instead of a court. Indeed, neither the Seventh nor the Ninth

Circuit made that argument. Instead, they challenged the enforceability of the requirement that arbitration proceed on an individual basis, not on a collective basis. *See, e.g., Ernst & Young* Pet. App. at 14a (stating that "[t]he problem with the contract at issue is not that it is requiring arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims").

Any effort to mandate that arbitration proceed on a collective basis runs headlong into *Concepcion*, which held unequivocally that "class arbitration, to the extent it is manufactured by [judicial decree] rather than consensual, is inconsistent with the FAA." *Concepcion*, 563 U.S. at 348. The Court noted, for example, that conducting arbitration on a class-wide basis sacrifices many of the advantages of arbitration that likely prompted the parties to agree to arbitration in the first instance. *Id.* at 348-51. In particular, "the switch from bilateral to class arbitration sacrifices the principal advantages of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

It is disingenuous for the Seventh and Ninth Circuits to assert that they are willing to abide the parties' choice of an arbitral forum and are declining to enforce the arbitration agreements only with respect to the requirement that disputes be resolved on an individual basis. As *Concepcion* makes plain, no employer would agree to arbitrate claims if it knew that arbitration would proceed on a class-wide basis. Accordingly, the Seventh and Ninth Circuit decisions must be evaluated on the basis of their inevitable

effect: the abolition of mandatory arbitration agreements between employers and employees.

B. The NLRA Contains No Express Congressional Command that Overrides the FAA

In light of the FAA's strong endorsement of the enforceability of arbitration agreements, the Court has placed on the party opposing enforcement the burden of demonstrating why the FAA should be overridden. *Gilmer*, 500 U.S. at 26 ("the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for" a federal statutory claim.). In a series of cases involving federal statutory claims, the Court has made clear precisely what that burden entails. The party opposing enforcement must demonstrate that "the FAA's mandate has been overridden by a contrary congressional command." *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 565 U.S. at 98; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). If such a command exists, it "will be discoverable in the text," the statute's "legislative history," or "an inherent conflict between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26. As the Fifth Circuit correctly determined, the NLRA does not include a "congressional command" that the FAA's mandate (to enforce arbitration agreements according to their terms) is overridden by Section 7's protection of employees' right to engage in "concerted activities." *D.R. Horton*, 737 F.3d at 360-62.

Nothing in the text of Section 7 comes anywhere near to qualifying as a "congressional command" that

overrides the FAA's mandate. In addition to granting employees the right to engage in several specific collective activities (*e.g.*, to form a union and to bargain collectively through representatives of their own choosing), Section 7 includes a residual grant: "to engage in other concerted activities for the purpose of ... other mutual aid or protection." Nothing in that generalized language (or in the NLRA's legislative history) suggests that Congress had class-wide adjudication in mind when it referred to "other concerted activity," let alone that it intended to override the FAA's mandate so as to bar the enforcement of arbitration agreements that preclude class-wide adjudication.

In each of the cases cited above, the Court concluded that those opposing enforcement failed to demonstrate a "congressional command" to override the FAA's mandate. *Italian Colors*, 133 S. Ct. at 2309-10; *CompuCredit*, 565 U.S. at 98-102; *Gilmer*, 500 U.S. at 27-29; *McMahon*, 482 U.S. at 240. It so held, even though several of the federal statutes in question included provisions expressly permitting collective actions in federal court. *See, e.g., Gilmer*, 500 U.S. at 32 (that the text of the ADEA "provides for the bringing of a collective action" to enforce statutory rights held insufficient to establish the existence of a congressional command to override the FAA's mandate). Given those prior decisions, there is no plausible basis for concluding that the Court should reach a contrary result with respect to the NLRA, a statute that is silent on the subject of collective actions.

Importantly, the Court has been explicit that any "override" of the FAA must be a *congressional*

override. The NLRB held for the first time in *D.R. Horton* that Section 7 creates a substantive right for employees to assert legal claims (alleging FLSA violations) on a class-wide basis. It confirmed that holding in *Murphy Oil*. *Murphy Oil* Pet. App. 17a-208a. But because those administrative holdings do not constitute congressional action, they are irrelevant to this Court's determination of whether the FAA's pro-arbitration mandate should be enforced in this instance.

In sum, those seeking to avoid enforcement of the arbitration agreements at issue here have failed to demonstrate that a contrary congressional command has overridden the FAA's mandate. Under the Court's case law, that failure requires that the arbitration agreements be fully enforced.

C. The FAA's Savings Clause Is Inapplicable Because Arbitration Opponents Can Point to No Generally Applicable Rule of Law as a Basis for Denying Enforcement

Neither the Seventh nor the Ninth Circuit undertook the "contrary congressional command" analysis mandated by this Court's case law. Instead they each purported to harmonize the FAA and the NLRA by determining that the FAA's savings clause renders the FAA's pro-arbitration mandate inapplicable. *See Epic Systems* Pet. App. at 18a ("If these statutes are to be harmonized—and according to all the traditional rules of statutory construction they must be—it is through the FAA's savings clause, which provides for the very situation at hand. Because the

NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement"); *Ernst & Young* Pet. App. at 16a ("[W]hen an arbitration contract professes the waiver of a substantive federal right, the FAA's savings clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield.").

The Seventh and Ninth Circuits have not simply ignored the "contrary congressional command" analysis mandated by this Court. They have also badly misinterpreted the FAA's savings clause, which is inapplicable here. That clause permits the invalidation of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." By its terms, the clause is irrelevant when the alleged "ground" for revocation (here, Section 7 of the NLRA) is not one that can be invoked to revoke "any" contract. Instead, as interpreted by the Seventh and Ninth Circuits, Section 7 invalidates only a very small number of contracts: those that directly interfere with employees' Section 7 rights to form unions, collectively bargain, or engage in other "concerted activities" protected by Section 7.

This Court has repeatedly rejected efforts to invoke the FAA savings clause on a ground that could not serve as a basis for invalidating *any* contract. *See, e.g., Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421 (2017); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); *Concepcion*, 563 U.S. at 341-344. *Concepcion* explained that while the FAA's savings clause "preserves generally applicable contract defenses," it does not preserve rules that interfere with the FAA's objectives, *id.* at 341, and that would have "a

disproportionate impact on arbitration agreements." *Id.* at 342.

The Seventh and Ninth Circuits seek to avoid that savings-clause case law by contending that Section 7 renders "unlawful" arbitration agreements that ban assertions of claims on a class-wide basis, and that a "general contract defense of illegality" permits invalidation of such agreements. *Ernst & Young* Pet. App. at 14a; *Epic Systems* Pet. App. 15a.[5] But that rationale would allow the savings-clause exception to swallow the rule. Whenever a party alleges that enforcing an arbitration agreement is inconsistent with some federal-law policy, it can allege "illegality" and (according to the Seventh and Ninth Circuits) avoid the FAA's mandate by invoking the savings clause. *Concepcion* explicitly rejected such a broad reading of the savings clause, stating that the FAA "cannot be held to destroy itself." 563 U.S. at 343.

D. The Savings Clause Does Not Apply to Potentially Conflicting Federal Statutes

The savings clause is also inapplicable because the policy to be "saved" derives from another federal statute, not state law. As Sixth Circuit Judge Sutton has explained, "Savings clauses save state laws from preemption; they don't save other federal statutes enacted by the same sovereign. Federal statutes do not

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[5] The NLRB has interpreted the savings clause in similar manner. *Murphy Oil* Pet. App. 17a-88a. Because the NLRB bears no responsibility for administering the FAA, its interpretation of that statute is not entitled to deference.

need to be 'saved' by a coequal statute in order to have effect." *NLRB v. Alternative Entertainment, Inc.*, ___ F.3d ___, 2017 WL 2297620 at *18 (6th Cir. 2017) (Sutton, J., dissenting) (citations omitted). This Court has held that any potential conflicts between the FAA and another federal statute are to resolved by imposing on the party opposing arbitration the burden of demonstrating a "contrary congressional command'—not by invoking the FAA's savings clause.

II. THE NLRA DOES NOT CREATE A SUBSTANTIVE RIGHT TO PURSUE COLLECTIVE CLAIMS

A. Congress Could Not Have Intended to Grant a Right to a Procedure that Did Not Exist in 1935

In concluding that the arbitration agreements at issue here should not be enforced as written, both the Seventh and Ninth Circuits placed particular emphasis on their findings that the rights created by Section 7 of the NLRB are "substantive" rights, not procedural rights. Indeed, the Ninth Circuit deemed its conclusion that Section 7 rights are "substantive" to be "crucial" to its determination that the arbitration agreements at issue should not be enforced. *Ernst & Young* Pet. App. at 14a.

WLF notes initially that whether Section 7 rights should be deemed substantive or procedural is largely irrelevant to the key issue before the Court: whether the NLRA includes a "congressional command" overriding the FAA. As Judge Ikuta pointed out in dissent, "In every case considering a party's claim that a federal statute precludes enforcement of

an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." *Id.* at 29a (Ikuta, J., dissenting). In any event, there is little or no evidence to suggest that Section 7 confers a substantive right of the sort that the Ninth Circuit deemed "crucial" to its determination.

Section 7 of the NLRA grants employees several specified rights (including the right to form a union and to bargain collectively) as well as a residual right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Under a well-known canon of statutory construction, *ejusdem generis*,[6] the term "concerted activities" most logically refers to activities similar in nature to forming a union or collectively bargaining with one's employer. It is quite a stretch to suggest that the term also applies to the assertion of class-based legal claims, an activity very dissimilar to forming a union and engaging in collective bargaining.

Moreover, Congress adopted the NLRA in 1935. As this Court has recognized, "modern class action practice emerged in the 1966 revision of Rule 23." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-33 (2001). At the time of the NLRA's enactment, employees seeking to vindicate their rights under federal labor

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[6] That canon counsels, "Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 135 S.Ct. 1074, 2015 (2015).

law would have had no means of doing so on a collective basis. Because class actions as we know them today did not exist in 1935, it is illogical to read into Section 7 an intent to grant employees a "substantive" right to engage in collective litigation.

The Seventh Circuit dismissed those concerns. It asserted that even though employees could not have filed a collective action in 1935 seeking a monetary award for an alleged violations of a federal statutory right, Congress in 1935 was "aware" that some courts had in some limited instances authorized "class, representative, and collective legal proceedings." *Epic Systems* Pet. App. at 8a-9a. That assertion makes little sense. Awareness of the existence of some forms of collective legal proceedings provides no support for a conclusion that Congress intended to create a right to engage in other forms of collective legal proceedings that did not exist at the time it enacted legislation.

B. Section 7 of the NLRA Protects Employees from Employer Retaliation for Engaging in Concerted Activities

The Seventh and Ninth Circuits construed Section 7 as providing employees with a sword: it allegedly grants them a substantive right to assert legal claims in a specified manner. That construction misreads Section 7, which is more properly read as a *shield* against adverse employment actions taken in response to specified concerted activities.

The assertion that protected "concerted activities" include the filing of legal claims is based

entirely on *dicta* in a single decision of this Court: *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). *Eastex* held that concerted activities protected by Section 7 include the distribution of literature in non-working areas of the employer's property—even though the literature discussed political issues of interest to union members, and was not limited solely to issues directly relevant to working conditions in the plant. 437 U.S. at 570. The Court upheld an NLRB determination that the employer committed an unfair labor practice by refusing to permit distribution of the literature and threatening retaliation against employees who did so. *Id.* at 574-75.

In discussing the types of concerted activities that are protected by Section 7, the Court explained that the statute's coverage is not limited to "the narrower purposes of 'self-organization' and 'collective bargaining.'" *Id.* at 565. It then observed, "it has been held [by other tribunals] that the 'mutual aid and protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 565-66 (citing several appeals court and NLRB decisions). The Court never stated whether it agreed with those holdings.

More importantly, nothing in *Eastex* lends support to the view that Section 7 protects the right to file specific types of legal claims (such as class actions) without regard to whether employees have signed contracts agreeing not to pursue legal claims on a collective basis. Every one of the NLRB and appeals court cases cited by *Eastex* involved employees who were retaliated against by the employer for filing an

employment-related lawsuit. *Id.* at 566 n.15. Indeed, when the NLRB announced its expanded interpretation of Section 7 in 2012 in *D.R. Horton*, every case cited by the Board in support of that new interpretation was likewise a retaliation case. *See Murphy Oil* Pet. App. at 178 & n.78 (views of Member Johnson, dissenting). In other words, even if Section 7 prohibits retaliation against employees who pursue legal claims on a collective basis, that is a far cry from interpreting Section 7 as barring employers from raising arbitration-agreement defenses to such claims. As Judge Sutton explained:

> [T]he *pursuit* of collective litigation is a different activity from collective litigation itself. And if the protected activity is the *pursuit* of collective litigation, then the Board's interpretation accomplished nothing. Waivers do not inhibit the right to pursue a goal; they inhibit the ability to obtain it. In this case, employees who signed the class-action waiver can band together to lobby their employer to remove the waiver from the contract, or they can ask a court to declare the waiver invalid on some generally applicable ground. The employees' pursuit of collective procedures may or may not bear fruit, but the pursuit will nonetheless be protected from retaliation.

Alternative Entertainment, 2017 WL 2297620 at *16 (Sutton, J., dissenting).

C. Collective-Action Rights Are Procedural and Thus Waivable

In a number of cases, the Court has suggested that an employer may not require an employee to waive a *substantive* legal claim as a condition of employment. Thus, after reviewing decisions in which it had enforced agreements requiring employees to arbitrate a federal statutory claim, the *Gilmer* Court noted that requiring an employee to submit his statutory claim to arbitration does nothing to impair the claim itself:

> In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). *Gilmer* does nothing to advance the anti-arbitration position in this case. That decision makes clear that the relevant *substantive* right is the underlying legal claim at issue—in these cases, the alleged failures to pay overtime wages, in violation of the FLSA. Adhering to the FAA by enforcing the arbitration agreements at issue will do nothing to prevent employees from pursuing their FLSA grievances. Indeed, they will be permitted to pursue those claims in a "concerted" manner by assisting each other with the filing of individual arbitration claims. The only relevant thing that enforcement of the agreements will do is to prevent employees from pursuing their arbitrations using class-based

procedures.

The Seventh and Ninth Circuits held that Section 7 creates a *substantive* right to pursue class-wide arbitration and is thus non-waivable. But that holding cuts against the understanding of this Court, which has regularly characterized the collective-action rights created by Fed.R.Civ.P. 23 as procedural in nature. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (stating that Rule 23 creates "procedural right[s]" that are "ancillary to the litigation of substantive claims"). Indeed, Rule 23 was designed solely for the purpose of improving litigation efficiency, by enabling litigants to avoid the time and expense of trying (and deciding) the same claims repeatedly. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (stating that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.")

The Court has carefully distinguished substantive from procedural rules, in order to ensure that federal courts do not violate the *Erie* doctrine, which limits the power of federal courts to supplant state law with judge-made rules. In general, federal courts must follow state law unless the contrary rule it seeks to impose can reasonably be classified as "procedural." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). In cases raising state-law issues, federal courts are permitted to employ the class-action rules specified in Rule 23 only because that rule is deemed procedural, not substantive. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2016) (plurality

opinion). And, as the Seventh and Ninth Circuits concede, a procedural right is waivable.

The assertion by those courts that Section 7 creates non-waivable, substantive rights cuts against a long history of judicial acceptance that Section 7 rights may be waived. Indeed, it is a well-accepted and common practice for a union to waive all of its members' Section 7 rights—including the right to strike—in return for an employers acceptance of a collective-bargaining agreement (CBA) that mandates arbitration of all issues arising under the CBA. That practice is so well accepted that the Court has upheld an employer's right to an injunction against a strike (over an issue subject to arbitration) undertaken in violation of a CBA's no-strike clause. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970). If a union is permitted to waive Section 7 rights of all employees within its bargaining unit—even employees who are not members of the union—there can be little justification for refusing to grant individual employees a similar waiver right.

In sum, any Section 7 rights to file class-based claims are procedural rights which, even if they are deemed waived by virtue of an arbitration agreement, do not compromise an employee's right to vindicate his substantive claim under federal law. As the Court observed in *Shady Grove*, there is no *substantive* distinction between a class action filed on behalf of 999 absent class members and 1,000 separate lawsuits asserting the identical claims; the defendant's potential "aggregate liability ... does not depend on whether the suit proceeds as a class action." 559 U.S. at 408 (plurality opinion).

D. If the Collective-Action Rights Created by Rule 23 Were Deemed "Substantive," Rule 23 Would Violate the Rules Enabling Act

The Rules Enabling Act, 28 U.S.C. 2072(b), provides an additional reason for interpreting the collective-action right being asserted in these petitions as a procedural right. If that right were determined to be a substantive, non-waivable right, it would raise serious questions regarding the validity of Rule 23. As the Court recently explained:

> [C]ongressional approval of Rule 23 [does not] establish an entitlement to class proceedings for the vindication of statutory rights. ... [I]t is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an "abridg[ment]" or "modif[ication]" of a "substantive right" forbidden to the Rules, see 28 U.S.C. § 2072(b).

Italian Colors, 133 S. Ct. at 2309-10.

It bears repeating that class actions as we know them today did not exist when Congress adopted the NLRA in 1935. Accordingly, no party to this cases asserts that employees in 1935 and subsequent decades had a right to insist that any arbitrations concerning employment issues be conducted on a class-wide basis. Rather, according to the NLRB, that right did not spring into existence until 1966 with the adoption of modern-day Rule 23. In light of that history, it is fair

to conclude that the substantive collective-action rights recognized by the Seventh and Ninth Circuits owe their existence to the adoption of the 1966 amendments to Rule 23.

Yet, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 367 (2011) (citing 28 U.S.C. § 2072(b)). If Rule 23 (in conjunction with Section 7) were interpreted as creating the "substantive" rights recognized by the Seventh and Ninth Circuits, it would undoubtedly be "enlarg[ing]" substantive rights, in violation of the Rules Enabling Act. In order to avoid any questions regarding the validity of Rule 23, the collective-action rights asserted in these petition should be deemed merely procedural—and thus waivable. *See Murphy Oil* Pet. App. 187a (views of Member Johnson, dissenting) ("Overriding the FAA certainly is an abridgement of a party's rights–both under the FAA and under that party's contract—to have its arbitration agreement enforced. Simply put, Section 7 cannot enlarge Rule 23 beyond the ability of Rule 23's own authorizing statute.").

Moreover, in light of the fact that modern-day class actions developed decades after adoption of the NLRA, there can be no plausible claim that enforcement of arbitration agreements prevents the effective vindication of employees' rights. As the Court explained, in denying an effective-vindication argument raised by antitrust plaintiffs:

> The class-action waiver merely limits arbitration to the two contracting parties.

> It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief .... Or, to put it differently, the individual suit that was considered adequate to assure "effective vindication" of a federal right before adoption of class-action procedures did not suddenly become "ineffective vindication" upon their adoption.

Italian Colors, 133 S. Ct. at 2311.

In sum, nothing in the language or history of the NLRA supports a claim that Section 7 creates the "substantive" right asserted by the Seventh and Ninth Circuits: a non-waivable right to pursue employment-related legal claims on a collective basis.

CONCLUSION

The Court should reverse the judgments of the courts of appeals in Nos. 16-285 and 16-300, and affirm the judgment of the court of appeals in No. 16-307.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

June 16, 2017